Supreme Court of the United States

OCTOBER TERM, 1969

No. 266

LELIA MAE SANKS NEE JONES, ET AL,
Appellants,

—v.—

GEORGIA, ET AL,
Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

INDEX

Chronological List of Dates of Pleadings, Hearings, Orders, etc.

(1) May 20, 1968—Dispossessory Warrant filed against Lelia Mae Sanks nee Jones.

(2) May 31, 1968—Application for a Rule Nisi filed on behalf of Sanks in the Civil Court of Fulton County (Georgia).

(3) May 31, 1968—Order of the Civil Court of Fulton County setting a date for a show cause hearing as to why Sanks should not be allowed to proceed without posting a bond.

(4) June 5, 1968—Hearing before the Civil Court of Fulton County on the procedural issue of whether Sanks should be allowed to proceed to the merits of her case without complying with the double bond provisions of the Georgia Code.

(5) July 9, 1968—Order of the Civil Court of Fulton County consolidating the cases to date and granting the State's oral motion to intervene.

(6) July 16, 1968—Dispossessory warrant filed against Marie Momman.

(7) July 26, 1968—Application for a Rule Nisi filed on behalf of Momman in the Civil Court of Fulton County.

(8) July 26, 1968—Order of the Civil Court of Fulton County setting a date for a show cause hearing as to why Momman should not be allowed to proceed without posting a bond.

(9) August 8, 1968—Order of the Civil Court of Fulton County consolidating Momman and Sanks, and granting the State's oral motion to intervene to assert the validity of the statutory provisions in question.

(10) October 2, 1968—Order of the Civil Court of Fulton County holding the statutory provisions in question unconstitutional.

Chronological List of Dates of Pleadings, Hearings, Orders, etc.—continued

(11) October 8, 1968—Notice of Appeal to the Supreme Court of Georgia filed by the State of Georgia in the Civil Court of Fulton County.

(12) November 1, 1968—Notice of Appeal to the Supreme Court of Georgia filed in the Civil Court of Fulton County by the Atlanta Housing Authority.

(13) January 23, 1969—Opinion of the Supreme Court of Georgia reversing the Order of the Civil Court of Fulton County.

(14) February 3, 1969—Motion for Rehearing filed.

(15) February 6, 1969—Motion for Rehearing denied by the Supreme Court of Georgia.

(16) February 20, 1969—Notice of Appeal to the Supreme Court of the United States filed by Appellants, Sanks and Momman, in the Supreme Court of Georgia.

(17) April 23, 1969—Jurisdictional Statement filed in the Supreme Court of the United States by Appellants, Sanks and Momman.

(18) May 14, 1969—Motion to Dismiss or Affirm filed in the Supreme Court of the United States by Appellees, The State of Georgia.

(19) June 23, 1969—Probable Jurisdiction noted by the Supreme Court of the United States.

DISPOSSESSORY WARRANT FILED IN THE CIVIL COURT OF FULTON COUNTY AGAINST LELIA MAE SANKS NEE JONES. —filed May 20, 1968

Dispossessory Warrant

CIVIL COURT OF FULTON COUNTY:

GEORGIA, Fulton County.

Personally appeared Clifford Sanks who on oath says that he is, plaintiff herein, and that Leila Mae Jones, defendant herein, is in possession, as tenant of a house and premises situated and known as 2236 Carver Dr., N. W. in said County, the property of said plaintiff, and that said tenant Leila Mae Jones fails to pay the rent now due thereon; and that the said owner desires and has demanded possession of said house and premises, and the same has been refused by the said defendant; and affiant makes this affidavit that a warrant may issue for the removal of the said defendant together with his property from said house and premises.

Sworn to and subscribed before me, this 5/20/68, 19....

CLIFFORD SANKS

W. L. WRIGHT, Deputy Clerk
Civil Court of Fulton County.

GEORGIA, FULTON COUNTY:

To the Marshal of said Court, or His Lawful Deputies, to All and Singular the Sheriffs or Their Lawful Deputies, and All Lawful Constables of said State, Greeting:

Affidavit having been made that the foregoing is in possession as a tenant of the premises described in said affidavit, and that said defendant has forfeited his right to the house and premises therein described, as specified in said affidavit.

You are hereby commanded to remove said defendant together with his property found thereon from said house and premises and to deliver full and quiet possession of same to the plaintiff herein.

Witness the Honorable THOMAS L. CAMP, Chief Judge of said Court.

This 5/20/68, 19....

W. L. WRIGHT, Deputy Clerk.
Civil Court of Fulton County.

GEORGIA, Fulton County.

On ....., 19..., I exhibited the within warrant to defendant, leaving notice of same with ..... in charge, and notice that at the expiration of three days from date I will proceed with the execution of same.

..... Deputy Marshal.

GEORGIA, Fulton County.

On 5-21-68, 19..., I exhibited the within warrant to defendant, tacking written notice on the door of said defendant and Gave T notice that at the expiration of three days from date I will proceed with the execution of same.

A. C. ADAMS, Deputy Marshal.

V $6.00 PAID
No. 63610

CIVIL COURT OF FULTON COUNTY
DISPOSSESSORY WARRANT

CLIFFORD SANKS, PLAINTIFF
2236 Carver Dr. N. W., *Address.*

vs.

LEILA MAE JONES, DEFENDANT.
2236 Carver Dr. N. W., *Address.*

Filed in Office this MAY 20 '68

D. W. AUSTIN, JR., Clerk
Pltffs. Atty.

Pltffs. Phone None
3 Days' Notice Expires 5-31 1968
Tenant Vacated ..... 19.....
Tenant Ejected ..... 19.....
Tenant Settled with Pltff. ..... 19.....
Held up by Pltff. until ..... 19.....
..... D. M.

APPLICATION FOR A RULE NISI FILED ON BEHALF OF SANKS IN THE CIVIL COURT OF FULTON COUNTY.

IN THE CIVIL COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

Dispossessory Proceedings
Warrant No. 63610

CLIFFORD SANKS, PLAINTIFF

vs.

LELIA MAE SANKS NEE JONES, DEFENDANT

vs.

H. A. SPRUILL, THIRD PARTY DEFENDANT

APPLICATION FOR RULE NISI

1. Defendant in the above-captioned case shows that she resides at 2236 Carver Drive, N. W., Atlanta, Georgia, and that she was purportedly served with a dispossessory warrant on May 21, 1968, said warrant being number 63610.

2. Defendant denies that the relationship of landlord and tenant exists between the plaintiff and defendant herein, and shows that said warrant is addressed to her in her maiden name and that she is the wife of the plaintiff herein having been ceremoniously married to him on August 16, 1966, in Stewart County, Georgia.

3. Defendant shows that no divorce proceedings have been undertaken by the plaintiff herein nor have the parties separated in any manner.

4. Defendant shows that she and her husband are purchasing their house and make payments therefor to The Bank of Georgia.

5. Defendant shows that by reason of the aforesaid she has substantial defenses to this eviction but that she is without means to post the double-rent bond required by Ga. Code Ann., § 61-303.

6. Defendant shows that said warrant is still outstanding and that it is reasonable, probable and imminent that a Marshal or Marshals of the Civil Court of Fulton County will execute said warrant on Wednesday, May 29, 1968, and dispossess the defendant.

7. Defendant shows that Ga. Code Ann., § 61-303 is unconstitutional on its face and as applied to this defendant insofar as said statute requires the posting of a double-rent bond as a precondition to this defendant's access to the court. By reason of the aforesaid defendant is entitled to proceed without the tendering of said bond.

8. Defendant further shows that Ga. Code Ann. § 61-305 is unconstitutional on its face denying all Georgia tenants equal access to the courts as guaranteed by the Georgia Constitution Article I, paragraphs two, three, and four, and the equal protection clause to the 14th Amendment to the United States Constitution by reason of the fact that all Georgia tenants by exercising their right to be heard must run the risk of losing a double-rent judgment if their defenses prove inadequate.

WHEREFORE, defendant prays:

(a) that this court issue a rule nisi requiring the plaintiff herein, CLIFFORD SANKS, the Chief Marshal of Fulton County, H. A. SPRUILL, and the Attorney General of the State of Georgia to show cause why the defendant should not be allowed to proceed without subjecting herself to the penal rent provisions of Ga. Code Ann., § 61-305, and why the defendant should not be able to proceed without the bond, pursuant to Georgia Code Ann., § 61-303.

ROBERT B. NEWMAN
ROBERT B. NEWMAN
Attorney for Defendant

65 Georgia Avenue, SE
Atlanta, Georgia - 30312
524-7982—524-7983.

[Jurat and Affidavit Omitted in Printing]

ORDER OF THE CIVIL COURT OF FULTON COUNTY STAYING THE EVICTION PENDING A SHOW CAUSE HEARING ON THE ISSUE OF WHY SANKS SHOULD NOT BE ALLOWED TO PROCEED WITHOUT POSTING A BOND.

IN THE CIVIL COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

DISPOSSESSORY PROCEEDING
Warrant No. 63610

CLIFFORD SANKS, PLAINTIFF

vs.

LELIA MAE SANKS NEE JONES, DEFENDANT

vs.

H. A. SPRUILL, THIRD PARTY DEFENDANT

ORDER—May 31, 1968

The motion in the above-styled case having been duly presented before me;

IT IS HEREBY ORDERED that the Plaintiff herein CLIFFORD SANKS, and third-party defendant, H. A. SPRUILL, the Chief Marshal of the Civil Court of Fulton County show cause before me on June 6, at 2:00 in open court why the defendant LELIA MAE SANKS nee JONES, should not be able to proceed in forma pauperis without the tendering of the bond as provided for in Ga. Code Ann., § 61-303, (1966 Rev.), and why the defendant LELIA MAE SANKS nee JONES, should not be able to proceed without the operation of the couble-rent recovery statute, Ga. Code Ann., § 61-305, (1966 Rev.), and why the defendant, LELIA MAE SANKS nee Jones, should not be able to remain on the premises until a hearing is had on the substantive issues provided that the defendant pays into the registry of the court the rent as it becomes due from the date of the signing of this order.

IT IS FURTHER ORDERED, that the Marshal of the Civil Court of Fulton County, H. A. SPRUILL, his agents and all others acting in his behalf hold in abeyance all proceedings in this case until the hearing on June 6, at 2:00 is had or until further order of this court.

IT IS HEREBY ORDERED, that the Attorney General of the State of Georgia be served with a copy of this motion and the order attached hereto.

This 31st day of May, 1968.

OSGOOD O. WILLIAMS
Judge, Civil Court of Fulton County.

[Certificate of Service and Acknowledgments Omitted in Printing]

[fol. 6]

IN THE CIVIL COURT OF FULTON COUNTY

TRANSCRIPT OF PROCEEDINGS—June 5, 1968

RELEVANT EXCERPTS FROM TESTIMONY AS TO THE PRACTICAL IMPOSSIBILITY OF OBTAINING THE NECESSARY BOND FOR DISPOSSESSORY PROCEEDINGS MADE A PART OF THE RECORD DURING THE HEARINGS ON APPELLANT'S APPLICATION FOR A RULE NISI BEFORE THE CIVIL COURT OF FULTON COUNTY.

[Title Omitted in Printing]

* * * *

THE COURT: All right, sir.

MR. NEWMAN: Mr. Richard Newfield.

THE COURT: In other words, actually, the record may note that this is solely a constitutional question as related to procedure, and your contentions are that the statute under consideration, which shall be pointed out to the Court, offends both the 5th and 14th Amendments to the U. S. Constitution and the due process clause of the state of Georgia.

MR. NEWMAN: Yes, Your Honor, and the equal protection clause to the state of Georgia, and the right of access laws to the state of Georgia.

RICHARD NEWFIELD,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEWMAN:

Q What is your name?

A Richard Newfield.

Q Where do you work, Mr. Newfield?

A I work at Korman-Romm Insurance Agency here in Atlanta.

Q How long have you been with this agency?
A I believe seven years this June, this month.
[fol. 7] Q I take it you are in the insurance business?
A Right. I am an independent agent.
Q How long have you been in the insurance business?
A I have been in insurance for ten years.
Q Are you familiar with the bond required of a tenant in order to defend in an eviction case?
A Yes, sir.
Q Are you familiar with the consequences when a tenant, after contesting in an eviction case, loses it sofar as the judgment is concerned?
A I think I am.
Q Are you aware of the fact that if the tenant loses, he has to pay double rent?
A Yes, I am.
Q Now, when—let us assume that one comes to you and requests a dispossessory bond. How long would you require the bond to last?
A I assume—
Q What would be the time?
A That would be determined by the Court. Wouldn't it be determined by the Court?
Q Assume—
A The bond itself would be indefinite until the case [fol. 8] was brought to conclusion.
Q And your coverage would have to comprehend this —the duration of the litigation?
A Right.
Q Mr. Newfield, what sort of collateral, if any, would be required to put up for one of these bonds?
A The various surety companies that we represent would require 100% cash collateral in 99% of the cases, I would say.
Q What do you mean by cash collateral; is that liquid?
A It's a cashier's check or a certified check or cash.
MR. NEWMAN: Okay.
THE COURT: You mean before you would write a bond?

THE WITNESS: Yes, sir.

THE COURT: You would require cash or collateral?

THE WITNESS: The surety company would and equal to the amount of the bond and they mean cash.

Q (By Mr. Newman) What are the particular risks involved in granting a bond of this nature?

A I don't quite follow you.

Q The question is rather redundant. Let me just withdraw it. What is the bond premium on this kind of thing?

A The bond premium would be $20 a thousand.

Q $20 a thousand?

A Subject to a minimum of $10 premium regardless of the amount.

[fol. 9] Q What is the insurance term for a bond of this nature, Mr. Newfield? I don't mean to suggest anything, but is it called a penalty bond or anything like that?

A It's a court bond. I would call it a court bond with a stipulated penalty or an open penalty bond depending on what the court requires. It is what the surety companies would call a financial guarantee and that is the reason for the cash collateral.

Q I see. Well, being familiar with the insurance business and so on, would you say that it was—these bonds are granted with ease or not?

A Not at all. In the first place, as an agent, I would only do it myself for someone that I knew or had confidence in or someone that I wished to do a favor for because it is nigh on to impossible really to place a bond of this sort and, really, as an agent, it is more trouble than it is worth for me. I would lose money just handling it.

Q Okay. That is all the questions I have.

A It would in effect be an accommodation for me and for the surety company.

MR. NEWMAN: Okay. You are right.

CROSS-EXAMINATION

BY THE INTERVENOR:

Q Sir, when you say that you require the posting of [fol. 10] cash, do I understand you to say that you require it in the full amount of the bond?

A Yes, sir.

Q In other words, $1,000 would mean they would have to pay $1,000 cash as collateral?

A Yes, sir.

Q Wouldn't it be fair to say you'd just flat refuse to issue bonds?

A Not in effect.

Q What would be the purpose of—

A My understanding of the purpose of most of the court bonds is the fact that the courts will not handle the cash.

Q I see. What if a person had other realty, would you take that as collateral for writing a bond?

A No, we wouldn't. When I say we, I am talking about the surety company itself.

Q You are talking about your surety company?

A I am an agent and representing several companies.

THE COURT: How many?

THE WITNESS: We have a total of about four surety companies.

INTERVENOR: I have no further questions.

[fol. 11] CROSS-EXAMINATION

BY MR. BATES:

Q Mr. Newfield, how many of these bonds do you write in the course of a year?

A I have never written one.

Q How many years have you been in the field selling insurance?

A Ten years.

Q How do you get such familiarity with these bonds if you have never written one?

A Because I have attempted to write one in the past, and I have from time to time gotten an indication from

companies, and in every case that I have heard about, the people do not have the money to put up the collateral; therefore, the bonds just aren't written.

Q How many bonds has your company written in the last year or so, do you know?

A Of court bonds?

Q Your agency, that's right, particularly on dispossessory warrants, not on garnishments.

A None at all on the—on this type of bond, none. We write quite a few court bonds, probably.

Q In short, your companies have set up certain rules that make it so difficult that none of your applicants can get a bond?

[fol. 12] A In effect, that is what it is.

Q What percentage of the insurance business does your agency have in metropolitan Atlanta, sir?

A I really have no idea.

Q But it would be a very small percentage of the entire—

A It certainly would be a small percentage of the total volume of business.

Q And you are not really representative of the entire insurance agency; you can only say the experience of your particular company and you only mentioned the rules and regulations as are promulgated by your particular companies.

THE COURT: In response to one of your companies, you elicited an answer whereby he had said he had obtained knowledge from other companies.

THE WITNESS: From several of the surety companies that we represent.

Q (By Mr. Bates) These are all companies that are represented by his agency?

THE COURT: By your own agency?

THE WITNESS: That is correct. What was the question?

Q (By Mr. Bates) In short, is the situation this, Mr. Newfield, that you have never written a dispossessory bond, that your company has only written one, is that correct?

[fol. 13] A We have never written one.

Q You have never written one, and that the rules are so prohibitive that your various companies set up and your agency sets up that makes it virtually impossible for a potential client to become an actual client?

A Not exactly. It is not a rule that our agency has set up. It is a rule for requirements that the bonding companies have. We represent more than one company, actually, for surety companies where we place various type bonds and I am very familiar with all kinds of court bonds and this particular bond falls into the category where collateral, 100% cash collateral, is required.

Q This is required by your companies?

A Yes, by the insurance companies or the surety companies, not by the agency. That is the difference I am trying to make. We are agents for various companies.

Q I see. Why do you think it is necessary for these companies to have these rules posting 100% cash bond?

A Well, this is a direct financial guarantee type of bond which says that if the principal under the bond loses the cash, the surety company will make good whatever moneys are stipulated in the bond and, on all direct financial guaranteed bonds, regardless of who it is or [fol. 14] whether it is a company or individual, they require cash collateral unless you are dealing in a major national firm, you know, that is listed on various stock exchanges that would have adequate funds to pay or to pay back the surety company should they have to pay a penalty.

Q On all of these cash bonds, you require 100% collateral?

A No. On the direct financial guarantee for less than national firms, let's say they do.

Q How about something such as a laborer's lien on an individual's house?

A No, not in that case.

Q You would not require cash bond in this case?

A It would depend on the case and the individual.

Q This is a direct exact amount that you are bonding.

A Right. Now, in the first case, in order to obtain a bond, as an agent, I would ask the surety underwriter: would he accept a financial statement? That would be the easiest way for me to handle it and, depending on the type of bond, in most cases, in all cases, a bond of this type they would require cash. They don't care about financial statement or anything else because the surety company knows that if they have to pay a penalty, they have got to pay it and then look to the principal to be [fol. 15] reimbursed and they just won't do it without the cash.

Q If I may put a hypothetical to you, sir: if Rich's, Incorporated owns the store building in which Davison's does business and wish to dispossess Davison's and sought out a dispossessory warrant, would you require a cash bond from Rich's?

A It is a hypothetical case, as you say. Probably for Rich's, no.

Q In other words, you look at the individual when you are setting the conditions under which you will give bond as much as you do the type of bond, look at the individual that is asking for the bond?

A Well, again, it depends on who is suing the case, whether it is an individual or who the defendant is in the case really. I would say to a certain extent, yes. As I say, with a national firm or well-known firm, someone or individual that would have obvious funds to pay any penalty, they might consider taking it without a cash collateral. But I would say just 99%—

THE COURT: Rich's is not an indigent in your judgment, is it?

THE WITNESS: Not hardly.

MR. BATES: That is all the questions I have, Your [fol. 16] Honor.

MR. NEWMAN: Thank you very much.

INTERVENOR: Your Honor, I at this time request the Court take judicial notice of the fact that there is no law in Georgia requiring that the surety on a bond be a bonding company; that it could, assuming it is agreeable to the Court, be an individual owning property as well as the bonding company.

THE COURT: Yes, sir, with this qualification, that the bond must meet the requirements of the statute in relation to amount and ability to meet the obligation.

INTERVENOR: Yes, sir.

* * * *

[fol. 26] THE COURT: No, sir. I think you ought to take the stand, Mr. Newman, for the record.

ROBERT B. NEWMAN,

being first duly sworn, testified in narrative form as follows:

DIRECT EXAMINATION

MR. NEWMAN: My name is Robert Newman and I am an attorney for the Legal Aid Society and on behalf of my clients in this case.

THE COURT: Name the clients now.

MR. NEWMAN: Mrs. Lelia Mae Sanks and Eva Mae White. I attempted to get a bond for this proceeding from three insurance companies: Fireman's Fund, Continental Casualty and Employers' Liability. I was unable to get these bonds.

THE COURT: Any questions?

INTERVENOR: Yes, sir.

CROSS-EXAMINATION

BY THE INTERVENOR:

Q Mr. Newman, did you confine your search to bonding companies?

A I just called these three bonding companies. I didn't contact any individuals, that is, you know, non-insurance people.

Q You didn't contact any friends who might own realty?

A No, I didn't.

[fol. 27] INTERVENOR: I have no further questions.

THE COURT: Do you have any questions?

CROSS-EXAMINATION

BY MR. BATES:

Q The three companies you called again were Fireman's Fund?

A Fireman's Fund, Continental—

Q Which is primarily a property insurance company, is it not?

A Well, I might say that all three of these insurance companies, I am told, do give bonds for this proceeding.

Q But they do not normally do so, this is not a great percentage of their business?

THE COURT: None of them normally do, counsel; that is well recognized. No insurance company—this gentleman pointed out a while ago that these insurance companies are less—generally require collateral unless the tenant should be one as has been brought out here like Rich's; otherwise, you can't get those bonds. That is well recognized.

Q (By Mr. Bates) Did you attempt any of the criminal bonding companies?

A No, I didn't.

Q To see if they would write such a bond?

A No, I didn't.

Dispossessory Warrant Filed in the Civil Court of Fulton County Against Marie Momman—Filed July 16, 1968

Dispossessory Warrant

CIVIL COURT OF FULTON COUNTY:

GEORGIA, Fulton County.

Personally appeared Miss Antha Mulkey who on oath says that he is attorney at law for The Housing Authority of the City of Atlanta, Ga., plaintiff herein, and that Mrs. Marie H. Momman, defendant herein, is in possession, as tenant of a house and premises situated and known as 155 Woodward Ave., S. E., Apt. 717, Atlanta, Ga. in said County, the property of said plaintiff, and that said tenant Mrs. Marie H. Momman fails to pay the rent now due thereon; and that the said owner desires and has demanded possession of said house and premises, and the same has been refused by the said defendant; Delinquent Rental and affiant makes this affidavit that a warrant may issue for the removal of the said defendant together with his property from said house and premises.

Sworn to and subscribed before me, this Jul. 16, 1968, 19....

Antha Mulkey

J. T. Hall, Deputy Clerk
Civil Court of Fulton County.

GEORGIA, FULTON COUNTY:

To the Marshal of said Court, or His Lawful Deputies, to All and Singular the Sheriffs or Their Lawful Deputies, and All Lawful Constables of said State, Greeting:

Affidavit having been made that the foregoing defendant is in possession as a tenant of the premises described in said affidavit, and that said defendant has forfeited his right to the house and premises therein described, as specified in said affidavit.

You are hereby commanded to remove said defendant together with his property found thereon from said house and premises and to deliver full and quiet possession of same to the plaintiff herein.

Witness the Honorable THOMAS L. CAMP, Chief Judge of said Court.

This Jul. 16, 1968, 19....

J. T. HALL, Deputy Clerk.
Civil Court of Fulton County.

Filed in Office July 16, 1968, D. W. Austin, Jr., Clerk

[Affidavit of Service Omitted in Printing]

APPLICATION FOR A RULE NISI FILED ON BEHALF OF MOMMAN IN THE CIVIL COURT OF FULTON COUNTY

IN THE CIVIL COURT FOR THE COUNTY OF FULTON—STATE OF GEORGIA

DISPOSSESSORY PROCEEDINGS
Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE, individually and in his capacity as Manager of Capitol Homes, PLAINTIFF

—*vs.*—

MARIE MOMMAN, DEFENDANT

—*vs.*—

H. A. SPRUILL, THIRD-PARTY DEFENDANT

APPLICATION FOR RULE NISI

1. Defendant in the above-captioned case shows that she resides at 155 Woodward Avenue, S. E., Apartment 717, Atlanta, Fulton County, Georgia, and that she was purportedly served with a dispossessory warrant on July 17, 1968, said warrant being No. 66636.

2. Defendant shows that she is a tenant of the Housing Authority of the City of Atlanta, Capitol Home Apartments (hereinafter cited as Atlanta Housing Authority) and that said Atlanta Housing Authority through its agent HARRY R. CHANCE, Manager of Capitol Homes, caused dispossessory warrant No. 66636 to issue on July 17, 1968 from the Marshal's office of the Civil Court of Fulton County, and that said warrant is still outstanding and that it is reasonable, probable and imminent that said warrant will be executed and a Marshal, or Marshals will execute said warrant and dispossess the defendant.

3. Defendant shows that she has been advised by counsel that she has substantial defenses to this eviction, but that she is without means to post the double-rent bond required by Ga. Code Ann. § 61-303 (1966 Rev.).

4. Defendant is informed and believes and based upon such information and belief avers that Mr. Harry Chance caused the dispossessory warrant in question to issue because of a personal quarrel he has had with defendant.

5. Defendant further shows that Ga. Code Ann. § 61-303 (1966 Rev.) is unconstitutional on its face, denying all tenants equal access to the courts as guaranteed by the Georgia Constitution, Article I, paragraphs two, three, and four, and the equal protection clause of the fourteenth amendment to the Constitution of the United States by reason of the fact that all tenants by exercising their right to be heard must run the risk of losing double-rent judgment if their defenses prove inadequate. For the aforesaid reason defendant is entitled to proceed in this action by the payment into the registry of the court of the rent as it becomes due and without subjecting herself to the penal provision of Ga. Code Ann. § 61-305 (1966 Rev.).

WHEREFORE, defendant prays:

(a) That this court issue a rule nisi requiring the plaintiff herein, Atlanta Housing Authority and its agent HARRY R. CHANCE, the Chief Marshal of Fulton County, H. A. SPRUILL, and the Attorney General of the State of Georgia to show cause why the defendant should not be allowed to proceed without subjecting herself to the penal rent provisions of Ga. Code Ann. § 61-305 (1966 Rev.), and why the defendant should not be able to proceed without the bond pursuant to Ga. Code Ann., § 61-303 (1966 Rev.).

JOHN WILLIAM BRENT
JOHN WILLIAM BRENT
Attorney for Defendant

64 Georgia Avenue, S. E.
Atlanta, Georgia 30312
524-2681

[Jurat and Affidavit Omitted in Printing]

ORDER OF THE CIVIL COURT OF FULTON COUNTY STAYING THE EVICTION PENDING A SHOW CAUSE HEARING ON THE ISSUE OF WHY MOMMAN SHOULD NOT BE ALLOWED TO PROCEED WITHOUT POSTING A BOND

IN THE CIVIL COURT FOR THE COUNTY OF FULTON—STATE OF GEORGIA

DISPOSSESSORY PROCEEDING
Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE, individually and in his capacity as Manager of Capitol Homes, PLAINTIFF

—*vs.*—

MARIE MOMMAN, DEFENDANT

—*vs.*—

H. A. SPRUILL, THIRD-PARTY DEFENDANT

ORDER—July 26, 1968

The motion in the above-styled case having been duly presented before me;

IT IS HEREBY ORDERED that the plaintiff herein Atlanta Housing Authority & HARRY CHANCE, its agent, and third-party defendant, H. A. SPRUILL, the Chief Marshal of the Civil Court of Fulton County show cause before the Presiding Judge on August 8, 1968, at 10 A.M. in open court why the defendant MARIE MOMMAN, should not be able to proceed in forma pauperis without the tendering of the bond as provided for in Ga. Code Ann., § 61-303, (1966 Rev.), and why the defendant MARIE MOMMAN, should not be able to proceed without the operation of the double-rent recovery statute, Ga. Code Ann., § 61-305, (1966 Rev.), and why the defendant, MARIE MOMMAN, should not be able to remain on the premises until a hearing is had on the substantive issues provided that the defendant pays into

the registry of the court the rent as it becomes due from the date of the signing of this order.

IT IS FURTHER ORDERED, that the Marshal of the Civil Court of Fulton County, H. A. SPRUILL, his agents and all others acting in his behalf hold in abeyance all proceedings in this case until the hearing on August 8, 1968 at 10:00 A.M. is had or until further order of this court.

IT IS HEREBY ORDERED, that the Attorney General of the State of Georgia be served with a copy of this motion and the order attached hereto.

This 26th day of July, 1968.

E. A. WRIGHT
Judge, Civil Court of
Fulton County

Filed in Office July 26, 1968, J. T. Hall, Deputy Clerk

ORDER OF THE CIVIL COURT OF FULTON COUNTY CONSOLIDATING SANKS AND MOMMAN AND GRANTING THE STATE'S ORAL MOTION TO INTERVENE TO ASSERT THE VALIDITY OF THE STATUTORY PROVISIONS IN QUESTION —August 8, 1968

IN THE CIVIL COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

DISPOSSESSORY PROCEEDINGS
Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA, and HARRY R. CHANCE, individually and in his capacity as Manager of Capitol Homes, PLAINTIFF

v.

MARIE MOMMAN, DEF.

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

Warrant No. 63610

CLIFFORD SANKS

v.

LEILA MAE SANKS, nee JONES

v.

H. A. SPRUILL

Warrant No. 63443

GIFFORD REALTY CO. and SARA LEAF

v.

EVA MAE WHITE

v.

H. A. SPRUILL

Warrant No. 64053

ALTON KING

v.

JOYCE LEE CLIFTON

v.

H. A. SPRUILL

Warrant No. 64361

TOMAN ROBINSON

v.

JO ANN RUSHER

v.

H. A. SPRUILL

ORDER

It is hereby ORDERED that the case concerning Warrant No. 66636 be consolidated with the remaining above cases.

It is further ordered that the oral motion of the State to intervene in the consolidated cases to assert the validity of the Georgia Statutory enactments in question is granted.

It is further ordered that the defendant in the case concerning Warrant # 66636, MARIE MOMMAN, should be able to remain on the premises until further order of this Court provided that she pay into the registry of the Court the rent as it becomes due from the date of the signing of the Order.

It is further ordered that the Marshal of the Civil Court of Fulton County, H. A. Spruill, his agents and all others acting in his behalf hold in abeyance all proceedings in this case until further order of this Court.

It is further ordered that the Attorney General of the State of Georgia be served with copy of this order.

This 8 day of August, 1968.

KERMIT C. BRADFORD
Judge, Civil Court of
Fulton County

Consented to:

KING & SPALDING

By: G. LEMUEL HEWES
G. LEMUEL HEWES

Atty. for the Housing Authority of the
City of Atlanta, Georgia and Harry R. Chance

JOHN WILLIAM BRENT
JOHN WILLIAM BRENT

Attorney for Marie Momman

ALFRED L. EVANS, JR.
ALFRED L. EVANS, JR.

Assistant Attorney General
State of Georgia

Filed in Office Aug. 8, 1968, W. L. Wright, Deputy Clerk

ORDER OF THE CIVIL COURT OF FULTON COUNTY HOLDING THE STATUTORY PROVISIONS IN QUESTION UNCONSTITUTIONAL—October 2, 1968

IN THE CIVIL COURT OF THE COUNTY OF FULTON, STATE OF GEORGIA

Warrant No. 63610

CLIFFORD SANKS, PLAINTIFF

v.

LEILA MAE SANKS, nee JONES, DEFENDANT

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

STATE OF GEORGIA, By the Office of the Attorney General, INTERVENOR

Warrant No. 69418

ULYSSES ROBINSON, PLAINTIFF

v.

LILLIE ALLISON, DEFENDANT

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

STATE OF GEORGIA, By the Office of the Attorney General, INTERVENOR

Warrant No. 66636

HOUSING AUTHORITY OF THE CITY OF ATLANTA and HARRY R. CHANCE, PLAINTIFFS

v.

MARIE MOMMAN, DEFENDANT

v.

H. A. SPRUILL, THIRD-PARTY DEFENDANT

STATE OF GEORGIA, By the Office of the Attorney General, INTERVENOR

On previous occasions the controversy presented here has been before this Court. The Court did not, however,

have an opportunity to render a decision upon the constitutional questions raised due to the fact the tenants' eviction caused the proceedings to become moot and thereby precluded a challenge to the constitutionality of the statute.

The precise questions under consideration and issues raised by the pleadings have never been adjudicated by the Supreme Court of Georgia. As a matter of fact our research discloses the precise question has never been adjudicated by either an inferior or appellate court. In the case of *Williams* v. *Shaffer*, et al., 222 Ga. p. 334 (1966) the Court refused to pass upon the issue because the controversy was held to be moot.

This Court, therefore, must be guided by such authorities which may shed light upon the subject matter and particularly must be guided by the interpretation of certain provisions of the Constitution of the United States and the Constitution of the State of Georgia as related to the delicate problem before this Court.

A Transcript of the evidence being a part of the record in this case, the Court does not regard it necessary to make a complete finding of fact, but rather considers it essential to discuss the constitutional questions raised by the pleadings and the authorities applicable thereto.

The tenants (defendants) respectively moved the Court to arrest their dispossession by plaintiffs (landlords) and be permitted to proceed in asserting their respective defenses without posting the bond required of tenants under Georgia Code, Ann. 61303 (Act 1827, Cobb, 902. Acts 1866, p. 25), so that the issues rasied in the respective defenses may be adjudicated by the Court.

The tenants alleged they were without means to obtain or post the double-rent bond required by the statute. The Motions are based upon a contention of each of the defendants that Title 61, Sec. 303 of the Ga. Code Ann. is unconstitutional upon its face and as applied and violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, United States Constitution and Article 1, paragraphs 2, 3 and 4 of the Constitution of the State of Georgia, Georgia Code Ann. 2-102 (6358), 2-103 (6359, 2-104 (6360 (1945), in that the aforesaid

statute individously bars tenants and particularly indigent tenants, from directly or indirectly challenging the dispossessory proceedings in the courts of the State of Georgia and thereby denies tenants, generally, access to the machinery of the courts.

Heretofore, courts have held that there is no provision in Georgia law which permits dispensing with the bond requirement, even in indigent cases. (See *Powell* v. *Gresham*, 180 Ga. 565) (1935), Code Sec. 61-303 of the Code Ann. as well as Code Sec. 61-305 of the Code Ann. were codified from an Act of the General Assembly of Georgia in 1827 and amended by an Act of 1866. In the case of *P. B. Hall* vs. *Vivian Holmes*, 42 Ga. p. 180, the Court in 1871 in part, held: "Inasmuch as there is no provision made in existing laws of this State, to dispense with the bond and security required of the tenant on account of his poverty a Court of Equity cannot make such an exception."

The Georgia Summary Eviction Statute now permits the landlord to oust a tenant by filing with the court an affidavit that the tenant has held over or has failed to pay rent (Ga. Code Ann. 61-301); and the judge issues a dispossessory warrant ordering the Sheriff or Marshal to evict the tenant and his possessions. (Ga. Code Ann. 61-302). The tenant may arrest the proceeding and prevent his summary eviction under the statute only by filing a counter-affidavit denying the landlord's allegations (Ga. Code Ann. 61-303) and thereby obtain a jury trial on the facts in issue (Ga. Code Ann. 61-304). But in order to remain in possession and obtain a trial (See Ga. Code Ann. 61-304) the statute is mandatory that the tenant must "tender a bond with good security payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case" (Ga. Code Ann. 61-303). If the tenant is not able to furnish the security bond he is summarily evicted. Georgia Code Ann. 61-305 provides: "If the issue specified in Ga. Code Sec. 61-304 shall be determined against the tenant, judgment shall be determined against the tenant, judgment shall go against the tenant for double the rent reserved or stipulated to be paid and further

provides for the payment of future double rent until the tenant surrenders possession of the premises after an appeal or otherwise."

Parenthetically, under Title 61 of the Code of Georgia the defendants now before this Court are "tenants at will." Georgia Law, 361-105, Ga. Code Ann., provides that a landlord may terminate a tenancy at will, for or without any reason, upon two months' notice; the tenant may terminate upon one month's notice. The uncontradicted evidence in the cases under consideration shows that the landlord did not give the tenants the notice specified under Sec. 61-105 and apparently did not desire to terminate the tenancy under that section. On the contrary, the landlord has proceeded under Sec. 61-301, in which it is alleged that the tenants are holding the premises over and beyond the term for which the same was rented to each of the said respective tenants and that the tenants are in arrearage of the rent as agreed upon between the tenant and the landlord. Having proceeded under this section and the warrant being sued out, as aforesaid, only four days' notice to the tenant is required by Code Sec. 61-306 of the Code, as amended, by the 1968 Session of the General Assembly of Georgia (Ga. L. 1968, pp. 124-126); six days' notice is required within Fulton County (Fa. L. 1968, pp. 1215-1216). Prior to the 1968 amendments merely three days' notice was required. After the expiration of the time specified in the notice, the statute provides that "said officer shall proceed with the execution of said warrant."

In Huckaby vs. Brooks, 75 Ga., p. 678 (1885), the Court held: "The law in respect to the right of landlords to distrain for rent is very straingent, and the execution of the writ, or order of the magistrate to seize and sell to collect rent, can be arrested by counter-affidavit only in one way. The tenant must swear that he does not owe the rent, or some part, because not due, and give bond and security for the eventual condemnation money." In support of this decision the Court cites the case of *Hall* vs. *Holmes*, 42 Ga. 186 (1871); *McCullough* vs. *Good*, 63 Ga. 519 (1879); as well as *Toomer* vs. *Mann*, 63 Ga. 735 (1879). Subsequent decisions of

the Supreme Court of Georgia follow the principles as pronounced in the decisions, supra; suits in Equity to enjoin dispossessory proceedings have been to the same effect. (See *Gilmore* vs. *Wells*, 78 Ga., 197 (1886); *Smith* vs. *Wynn*, 111 Ga. 884 (1900); *Pope* vs. *Thompson*, 157 Ga. 891 (1924); *Brown* vs. *Watson*, 115 Ga. 592 (1902); *Napier* vs. *Varner*, 149 Ga. 586 (1919). The latest decision dealing with the question of suits in equity to enjoin dispossessory proceedings is is in the case of *Powell* vs. *Gresham*, 180 Ga. 565 (1935); and there the Court held "A warrant to dispossess will not be emjoined by a court of equity; the remedy of the tenant, if he has any defense, being to file the counter-affidavit provided for by the statute; and this is so though the tenant, on account of poverty, may be unable to give the bond and security required as a condition precedent to the filing of such counter-affidavit." The Powell case, therefore, approved the cases supra. on the question of the tenant pursuing any action to enjoin the landlord from proceeding.

As heretofore pointed out in those cases constitutional questions were not appropriately raised by the tenants. Undoubtedly, it was the intent of the Legislature to protect the landlord against ill-founded or frivolous claims of the tenant. The protection devised was that as a condition precedent to resist in the dispossessory proceeding the tenant not only in required to post bond but he and his bondsman are also obligated and required to pay double-rent in the event his defense is adjudicated to be without merit.

In relation to conditions precedent, the courts have held as long as the basis of distinction is real and the condition imposed has a reasonable relation to a legitimate object, the State may without violating the Equal Protection Guaranty prescribe a reasonable and appropriate condition precedent to the bringing of an action of a specified kind or class which includes requiring the execution of a bond under certain circumstances. A qualification or an exception to that principal, is that a citizen cannot be deprived of a remedial right indirectly by imposing conditions which are so harsh and oppressive as

to prevent him from executing the right. See *Jones* vs. *Union Guano Co.* 264 U. S. 171 (1923); also *Scarborough* vs. *Newsome*, 7 So. 2d p. 321.

Historically, the courts have many times disagreed as to what constitutes Equal Protection of the laws and, likewise what constituted the denial of Due Process. Basically the Equal Protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the Constitutional requirement, when its courts are open to all with like rules and modes of procedure, for the security of their persons and property and the prevention and redress of wrongs. Equal Protection of the Law means that Equal Protection and security are given to all and this specifically includes the exemption from any greater burden or burdens that are imposed upon all others under like circumstances.

Relevant Georgia Constitutional Provisions

2-102—Protection the Duty of Government

Protection to person and property is the paramount duty of government and shall be impartial and complete.

2-103—Life, Liberty and Property

No person shall be deprived of life, liberty or property except by due process of law.

2-104—Right to the Courts

No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both.

U. S. Constitution, Fourteenth Amendment

. . . Nor shall any State deprive any person of life, liberty, or property without due process of law; nor to deny any person with its jurisdiction the Equal Protection of the law.

In dealing with Title 61 of the Code Ann., this Court is concerned directly with two Code sections, 61-303 and 61-305 of the Georgia Code Ann. Though reference has been made to other sections of Title 61, in doing so we consider these sections only as related to 303 and 305

respectively. The sole question, therefore, is whether or not the bond and double rent requirements of Georgia Law violate the Due Process and Equal Protection clauses of the Constitutions of the United States and the State of Georgia, thus denying tenants the right of access to the court.

It is elementary and a well established principle of constitutional law that all litigants must have Equal Access to the courts in the enforcement of and defense of legal rights and our own State Constitution expressly guarantees every person "the right to prosecute or defend his own cause in any of the courts of this State." See *Davidson* vs. *Jennings*, 27 Colo. 187, 190.

Whereas, the Due Process clause of the State Constitution as well as the Fourteenth Amendment of the United States Constitution is sufficient to guarantee to all persons access to the courts, it is of significance that the Constitution of the State of Georgia unequivocally by its wording is specific in guaranteeing that all persons shall have access to the courts to prosecute or defend their causes.

The defendants' contention of invidious and unconstitutional discrimination is supported by a number of authorities and the Georgia courts have long rejected any procedures that treat equal litigants unequally. In the *First National Bank* vs. *State Highway Department*, 219 Ga. 144 (1963), the Court held unconstitutional the statute under which a condemnee was required to pay interest on any money award by the special master in the event a jury subsequently reduced the condemnation award. In holding the statute unconstitutional the Court pointed out that under the Statute the condemness unlike all other litigants in the State would be obligated to pay interest on money due the State before a jury had made a final determination of the actual amount due. In this case as in others the Court held that the provision treating various litigants differently violates the State Constitutional requirement that "Protection to person and property shall be impartial and complete." See *Valdosta* vs. *House*, 156 Ga. 496 (1923); *City of Newnan* vs. *Atlanta Laundries, Inc.*, 174 Ga. 99 (1931); *American Bakeries Co.* vs. *City of Griffin*, 174 Ga. 115 (1931).

The Court is not unmindful of Statutes classified as "Bad Faith" Statutes as applied to tort actions as well as contract actions. Under the Bad Faith Statutes, however, the question of whether or not Bad Faith in fact exists is based upon a determination of whether or not a justiciable issue exists between the parties and if in fact a justiciable issue does exist the penalty sections cannot be applied.

Under Code Section 61-305 if the issue is decided against the tenant judgment goes against him for "double the rent" and this is true even though the tenant may have a justiciable issue, but does not prevail in the litigation.

The Supreme Court of Georgia has considered Code Section 2-103 of the Ga. Code Ann., being part 4, Section 1 of the Constitution, to mean that a party who seeks judicial relief cannot be penalized if he loses his case. The Court in refusing to award damages to the defendant said a litigant may not "be penalized by the award of damages whenever he loses his case. Otherwise, every man would enter the doors of the Courthouse, no matter how honestly or with what probable cause, with a danger of damages hanging over him." *Fender* vs. *Ramsey*, 131 Ga. 449 (1908).

Thus the Court upheld the individual litigant's right to uninhibited access to the courts as guaranteed by the Constitution of Georgia. This rationale was upheld in *King* vs. *Pate*, 215 Ga. 593 (1960), where *Fender* vs. *Ramsey* was cited with approval, as well as in *Builders Supply Co.* vs. *Pilgram*, 115 Ga. 85 (1902).

Citing Fender vs. Ramsey with approval in *Davidson* vs. *Jennings* supra, the Supreme Court of Colorado in discussing the constitutionality of a statute stated: "Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment by one when it is given freely and open handed to another, without money and without price, nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, the right to be treated equal in the enforcement and defense of legal rights by the imposition of arbitary, unjust, odious discriminations perpetrated un-

der color of establishing peculiar rules for a particular occupation."

In giving consideration to the constitutionality of Code Section 61-303, as well as 61-305, the Court cannot ignore the time element as provided by Code Section 61-306 in which the defendant tenant is required to post the bond as prescribed in Code Sec. 61-303, nor can the Court overlook the statute specifying the time element a tenant has in which to arrest the proceeding by the filing of counter-affidavit in the event he is able to obtain a bond, the bond being a necessary prerequisite in order to retain possession of the premises. In *Holland Furnace Company* vs. *Willis*, 222 Ga., p. 156 (1966), the Court held, "the primary essentials of Due Process of law are notice and an opportunity to be heard; and, essential to an opportunity to be heard is the right to a reasonable time, after notice, for preparation of a defense to a proceeding or suit."

The statutory provisions involved are no less repugnant to the Federal Constitution than they are to the Georgia Constitution.

In giving considerations to the attack upon the statutes herein involved the Court cannot brush aside *Griffin* vs. *Illinois*, 351 U. S. 12 even though Griffin vs. Illinois involved a criminal defendant. It is obvious the Court's opinion did not limit the principle to criminal defendants and in fact the Court in its decision cited with approval *Hovey* vs. *Elliott*, 167 U. S. 409 (1897), using the following language: "No one would contend that either a state or the federal government could constitutionally provide that defendants unable to pay court cost in advance should be denied the right to plead not guilty or to defend themselves in court (citing *Hovey* vs. *Elliott* supra). Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor."

As noted in *Griffin* vs. *Illinois*, the 14th Amendment guarantees certain fundamental rights to an indigent defendant in State criminal proceedings. *Griffin* vs. *Illinois* makes it possible for the defendant to prosecute an appeal with a transcript of the evidence even though the

defendant is unable to pay for same. Subsequently, the Supreme Court held that despite a criminal defendant's inability to pay, the right of counsel was nonetheless inviolate. *Gideon* vs. *Wainwright*, 372 U.S. 335 (1963). Anything less to support such fundamental rights for every citizen, regardless of his station in life, would amount to a denial of due process and equal protection of the laws.

The crux of the case now before this tribunal questions the validity of a statute that denies an indigent defendant a hearing in a dispossessory proceeding, solely on account of his poverty. The denial of the hearing stems directly from the defendant's impoverished circumstances which make it impossible for him to provide the required statutory bond.

In *Hovey* vs. *Elliott*, 167 U. S. 409, the Supreme Court of the District of Columbia deprived a defendant of his right to answer a suit brought against him. Having stricken the defendant's answer, the Court entered judgment against him as a punishment for his refusal to deliver to the Court-appointed receiver certain funds which were the subject matter of the litigation. When the State of New York later refused to honor that judgment, the Supreme Court of the United States held: "that the District Court of Columbia had deprived defendant of his property without Due Process of Law by denying him his constitutional right to a day in court."

The Supreme Court, at 167 U. S. 409, 413, went on to say that a hearing, an opportunity to be heard, is fundamentally in effect, part and parcel of due process: "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right tp defend an action and to enter decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression . . . .

" 'A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' "

In *Hovey* vs. *Elliott the Supreme Court* reaffirmed the common law that "no man was condemned without being afforded opportunity to be heard" in constitutional terms. And, explained the Court, this principle is simply the rule of natural reason, expressed by Seneca 2000 years ago: Qui statuit aliquid, parte inaudita altera, Aequum licet statuerit, haud aequus fuit—He who determines any matter without hearing both sides, though he may have decided right, has not done justice.

Constitutional guarantees of due process and equal protection apply to other than criminal cases. In finding the Virginia poll tax unconstitutional, Justice Douglas, for the Court, stated in *Harper* vs. *Virginia Board of Election Comm.*, 383 U. S. 663, 668-670 (1966): "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored . . . .

" 'We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined . . . .

" 'Those principles apply here. For to repeat, wealth or fee-paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.' "

Certainly the right to a hearing is no less precious and sacrosanct. This Court is now being asked to stamp its judicial imprimatur upon the dispossession of the defendants—all without granting a hearing to the defendants. It is to be noted that a suit by private individuals to oust other private individuals from the occupancy of their property constitutes state action under the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Therefore, a State court may not enforce private "self help" techniques authorized by the common or statutory law for dispossession unless the Court's action complies with the requirements of the Fourteenth Amendment.

The real question at issue is whether the defendants are to be granted a hearing before their dispossession. It is the same question asked by St. John, 7:51, "Doth our law judge any man, before it hear him and know what he doeth?" This Court has no choice but to answer with a pious no. The requirement that an indigent post a bond before he is granted a hearing is an impossibility. The uncontradicted evidence in these proceedings show that the defendants are indigent and unable to obtain bonds; this situation takes on increasing importance when considered in the light of the evidence that during the year 1967 more than 19,000 dispossessory warrants were issued in Fulton County and the fact that defenses were actually interposed in merely 13 instances.

The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The availability of the courts is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which a defendant is without means to procure.

The Statute which requires a bond before appearing in court is an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond.

Accordingly it is the order of this Court that the respective defendants have the right to file any and all defenses they may have in connection with this matter without first posting bonds; it is further ordered that pending a final determination of this litigation or until further order of the Court, the respective defendants are to pay monthly without penalty into the registry of the Court, the sums stipulated between the parties as rent.

It is further ordered that the defendants (tenants) may proceed to assert their defenses without being subjected to the penalty imposed by Section 61-305, being the Section dealing with "double rent".

Counsel for the defendants (tenants) have committed themselves in open Court that the rent will be paid into the Registry of the Court until the aforesaid actions are

adjudicated and any tenant who fails to comply with this order, the action as related to that particular tenant, shall be dismissed upon appropriate motion and proper showing.

It is the ruling of this Court that Code Section 61-303 being codified from Act of the General Assembly of 1827, as amended, and Code Section 61-305, being codified from the Act of the General Assembly of 1827, as amended, are unconstitutional insofar as said Statutory provisions require tenant as a precondition to the defense of his case to tender a bond with good security, payable to the landlord for the payment of such sums, with costs, as may be recovered against him on the trial of the case; and insofar as said statutory provisions permit a landlord to recover from the tenant an amount equal to double the rent that may become due from date of the issuance of the warrant.

I do hereby certify in accordance with the procedure provided for under Georgia Laws 1968, p. 1073, being the appellate procedure Act of 1965, as amended; that the instant order and ruling of the Court is of such importance to the cases under consideration that immediate review should be had; and it is so ordered by this Court.

This the 2nd day of October, 1968.

/s/ Osgood O. Williams
Judge, Civil Court
of Fulton County

OPINION OF THE SUPREME COURT OF GEORGIA REVERSING THE ORDER OF THE CIVIL COURT OF FULTON COUNTY

SUPREME COURT OF GEORGIA

Decided Jan. 23, 1969

24992

STATE OF GEORGIA

v.

SANKS nee JONES ET AL.

24993

THE HOUSING AUTHORITY OF THE CITY OF ATLANTA ET AL.

v.

SANKS nee JONES ET AL.

Code §§ 61-303 and 61-305 do not violate the Fourteenth Amendment to the United States Constitution (Code § 1-815) nor the corresponding provisions of the Georgia Constitution (Code §§ 2-102, 2-103, 2-104, Art. 1, Sec. 1, Par. 2, 3, 4, Const. 1945).

UNDERCOFLER, Justice. This appeal is from the trial court's ruling that Code §§ 61-303 and 61-305 relating to dispossessory warrant proceedings are unconstitutional under the equal protection and due process clauses of the 14th Amendment to the U. S. Constitution (Code § 1-815) and corresponding provisions of the Georgia Constitution (Code §§ 2-102, 2-103, 2-104, Art. 1, Sec. 1, Par. 2, 3, 4, Const. 1945).

Code § 61-303 requires a tenant as a condition precedent to filing a defense to a dispossessory warrant to "tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

Code § 61-305 directs that if the issue shall be determined against the tenant, judgment shall go against him for double the rent.

1. "The Fourteenth Amendment to the Federal Constitution does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object." 16 Am.Jur.2d 925, § 535; 16A CJS 507, § 559; Jones v. Union Guano Co., 264 US 171, 181 (44 SC 280, 68 LE 623). The rule is equally applicable to the filing of a defense.

In our opinion Code § 61-303 requiring a tenant filing a defense to a dispossessory warrant to post a bond to secure the landlord is not unreasonable. To the contrary, it is entirely appropriate and equitable to guarantee payment to the landlord while a tenant resists evidtion and has the use and benefit of the premises. The fact that a tenant in a particular case is indigent and unable to furnish a bond does not permit a different conclusion. Napier v. Varner, 149 Ga. 586(2) (101 SE 580); Reardon v. Bland, 206 Ga. 633, 639(3) (58 SE2d 377). "One of the principles on which this government was founded is that of equality of right, and this principle is emphasized in the equal protection clause of the Fourteenth Amendment. The Constitution of the United States is no respecter of the financial status of persons, and rich and poor are to be accorded equal rights under it . . ." 16 Am.Jur. 851, § 489.

"The due-process clause, and article 1, section 1, paragraph 4 (Code § 2-104) of the Constitution of 1945, providing that 'No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both,' do not guarantee to the citizen of the State any particular form or method of State procedure. Its requirements are satisfied if he has reasonable notice and opportunity to be heard, and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." Zorn v. Walker, 206 Ga. 181(2) (56 SE2d 511).

"The proceeding to dispossess a tenant holding over is not instituted primarily for the purpose of collecting

rent. Its main purpose is to restore the landlord to the possession of the premises, and the imposition upon the tenant of a liability for double rent is an incident to the proceeding, and is in the nature of a penalty inflicted upon him for the wrong he has committed in refusing to deliver possession of the premises after demand is made upon him." Willis v. Harrell, 118 Ga. 906, 910(8) (45 SE 794); Hamilton v. McCroskey, 112 Ga. 651 (37 SE 859).

It is not unreasonable to allow appropriate damages as provided by Code § 61-305 against a tenant for unlawfully withholding possession of the landlord's premises. The summary dispossessory warrant proceeding is limited to failure to pay rent, holding over, or holding as a tenant at will or sufference, all of which facts should be within the knowledge of the tenant. The statutory damages provided by Code § 61-305 are reasonably calculated to compensate the landlord for having been unlawfully denied the use of his premises and to deter a tenant from asserting frivolous defenses to a rightful dispossession.

Except in extremely unusual circumstances, it is difficult for us to conceive that a landlord would attempt to oust a tenant who is complying with the terms of his lease. However, if this should occur, the tenant is not without remedy. He can sue for damages for wrongful eviction. Crusselle v. Pugh, 71 Ga. 744(2); Cannon v. Laing, 153 Ga. 88 (3, 4) (111 SE 565).

Furthermore, if the relationship of landlord and tenant does not exist and the occupant is unable to post bond because of his financial condition, an equitable remedy is available to him. Pope v. Thompson, 157 Ga. 391(1) (122 SE 604); Harvey v. Atlanta & Lowry National Bank, 164 Ga. 625(2) (139 SE 147); and Sims v. Etheridge, 169 Ga. 400(1) (150 SE 647).

Accordingly we cannot say that Code §§ 61-303 and 61-305 are unreasonable and therefore unconstitutional within the meaning of the Fourteenth Amendment to the United States Constitution and the comparable provisions of the Georgia Constitution.

2. For the reasons stated the trial court erred in holding that Ga. Code §§ 61-303 and 61-305 were unconstitutional, in allowing the tenants to file their counter-affidavits without first posting the bond required by Code § 61-303, and in holding that the tenants be permitted to assert their defenses without being subjected to the double rent provision of Code § 61-305.

Judgment reversed. All the Justices concur.

IN THE SUPREME COURT OF GEORGIA

24992

24993

The Honorable Supreme Court met pursuant to adjournment.

JUDGMENT—January 23, 1969

STATE OF GEORGIA

v.

LELIA MAE SANKS nee JONES ET AL.

This case came before this court upon an appeal from the Civil Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reasons stated in the opinion this day filed. All the Justices concur.

BILL OF COSTS, $30.00

* * * *

IN THE SUPREME COURT OF GEORGIA

24992

24993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

STATE OF GEORGIA

v.

LELIA MAE SANKS nee JONES ET AL.

THE HOUSING AUTHORITY OF THE CITY OF ATLANTA ET AL.

v.

LELIA MAE SANKS nee JONES ET AL.

ORDER DENYING MOTION FOR REHEARING—
February 6, 1969

Upon consideration of the motion for a rehearing filed in these cases, it is ordered that it be hereby denied.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 1977 Misc., October Term, 1968

LELIA MAE SANKS, ET AL., APPELLANTS

v.

GEORGIA, ET AL.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 23, 1969

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT OF THE UNITED STATES

No. 1977 Misc., October Term, 1968

LELIA MAE SANKS, ET AL., APPELLANTS

v.

GEORGIA, ET AL.

ORDER NOTING PROBABLE JURISDICTION—June 23, 1969

APPEAL from the Supreme Court of the State of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1554, placed on the summary calendar and set for oral argument immediately following No. 1232.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357978 50

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~266~~ 28

Jud. Statement not printed
Appendix not printed

LELIA MAE SANKS nee JONES, *et al.*,
Appellants,

—v.—

GEORGIA, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANTS' BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 266

LELIA MAE SANKS nee JONES, *et al.*,

Appellants,

—v.—

THE STATE OF GEORGIA, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANTS' BRIEF

Appellants appeal from the judgment of the Supreme Court of Georgia, entered on January 23, 1969, reversing the order of the Civil Court of Fulton County which held unconstitutional Sections 61-303 and 61-305 of the Code of Georgia (1933) (Section 61-305 as amended by 1947 Georgia Laws 657) (hereinafter referred to, for the sake of consistency, as Sections 61- 303 and 61-305 of the Georgia Code Annotated (1966)).

Opinion Below

The opinion of the Supreme Court of Georgia is reported officially in 225 Ga. 88, and unofficially in 166 SE 2d 19. The opinion of the Civil Court of Fulton County is not reported, and is appended to this brief (A. 27).

Jurisdiction of This Court

The jurisdiction of the Court is derived from 28 U.S.C. §1257(2), authorizing this Court to review cases decided by State Supreme Courts "where is drawn into question the validity of any state statute on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." In the instant case Appellant challenged, and the Georgia Supreme Court upheld, the constitutionality of §§61-303 and 61-305 of the Georgia Code Annotated.

This proceeding was begun by Appellee-Landlords for the purpose of evicting Appellant-Tenants from private and public housing in Fulton County, Georgia (A. 3, 18). The Landlords' actions were brought pursuant to Ga. Code Ann. §§61-303 and 61-305.

Sections 61-303 and 61-305 enable a landlord to evict his tenant by simply serving the latter with a notice of eviction. The notice need only allege that the tenant occupies the landlord's premises unlawfully or that the tenant has not paid rent which has become due. The only method by which a tenant may appear in court to challenge or refute the allegations of the landlord is to post a bond equal to any damages which might be recovered by the

landlord (§61-303). If the judgment of the court favors the landlord, he must be awarded as his damages twice the amount of rent agreed upon by the tenant and the landlord (§61-305).

Appellant-Tenants challenged §§61-303 and 61-305 under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States. They made their challenge in the Civil Court of Fulton County, Georgia (hereinafter referred to as the Trial Court). The Trial Court held §§61-303 and 61-305 unconstitutional (A. 27). Appellees filed an Appeal of the Trial Court judgment in the Supreme Court of Georgia, which Court is the highest Georgia Court in which a decision of the case could be rendered (A. 2).

The Supreme Court of Georgia, on January 23, 1969, reversed the decision of the Trial Court and held §§61-303 and 61-305 constitutional (A. 40). Appellant's request for rehearing in the Georgia Supreme Court was denied on February 6, 1969 (A. 44). It is from the judgment of the Supreme Court of Georgia that Appellants appeal, by Notice of Appeal filed in the Supreme Court of the United States on February 20, 1969 (A. 2). Appellants' Jurisdictional Statement was filed with the Court on April 23, 1969 (A. 2).

This Court noted probable jurisdiction on June 23, 1969 (A. 45).

Provisions of the United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

Georgia Code Annotated, Section 61-303

Sec. 61-303. *Arrest of proceedings by tenant, counter-affidavit and bond.*—The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise from the person who made the affidavit on which the warrant issues, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the

payment of such sums with costs, as may be recovered against him on the trial of the case.

GEORGIA CODE ANNOTATED, SECTION 61-305

Sec. 61-305. *Double Rent and Writ of Possession, When.*—If the issue specified in the preceding section (Ga. Code Ann. §61-304) shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises.

Questions Presented

1. Do Ga. Code Ann. §§61-303 and 61-305 arbitrarily discriminate against all tenants in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Do Ga. Code Ann. §§61-303 and 61-305 unconstitutionally discriminate against indigent tenants in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Do Ga. Code Ann. §§61-303 and 61-305 unconstitutionally deny to tenants in Georgia the due process of law guaranteed by the Fourteenth Amendment to the United

States Constitution by denying to tenants the right to be heard, and the substantive right to litigate?

4. Do Ga. Code Ann. §§61-303 and 61-305 unconstitutionally deny to tenants in Georgia the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution by creating a vague and incomprehensible standard that permits drastic differences in interpretation?

Statement of the Case

This case involves the constitutionality of §§61-303 and 61-305 of the Georgia Code Annotated—the identical statutes which were under attack in *Williams* v. *Shaffer*, 385 U.S. 1037 (1967). In that case, this Court denied certiorari because the tenant had been evicted, rendering the case moot. Mr. Justice Brennan dissented without opinion. The Chief Justice concurred with Mr. Justice Douglas who stated in his dissenting opinion:

> This case involves an important question regarding the right of a poor tenant to remain in possession of his shelter and defend against eviction in a court of law. It is part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause. *Ibid.*

In contrast to the *Williams* case, Appellant-Tenants in the instant case remain on the premises. Thus, the Court is free to examine the issues raised by the Georgia statutes.

In compliance with Ga. Code Ann. §§61-303 and 61-305, and other sections not pertinent to this Appeal, Appellants were served by their landlords with notices of eviction (A. 3, 18). Being indigent, Appellants were unable to post the bond required by §61-303, and they therefore applied to the Trial Court for rules nisi (A. 5, 20), where they first raised the federal questions sought to be reviewed in this proceeding. They alleged that §§61-303 and 61-305 violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States; and they raised issues under the corresponding provisions of the Constitution of the State of Georgia (Ga. Const. Art. I, §I, Paras. II, III and IV).

The Trial Court entered an Order directing Appellee-Landlords and the Marshal of Fulton County to show cause why Appellants should not be allowed to proceed without subjecting themselves "to the penal rent provisions" of §§61-303 and 61-305 (A. 7, 22). The State of Georgia, which under Georgia law is a statutory party to any action that challenges the validity of a Georgia statute, intervened in each of the proceedings and was made a party of record (A. 24).

The cases were consolidated for hearing, and after holding an evidentiary hearing, the Trial Court held on October 2, 1968, that §§61-303 and 61-305 are an unconstitutional denial of Appellants' rights to due process and equal protection. The Court stated:

> The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The

availability of the court is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which a defendant is without means to procure.

The Statute which requires a bond before appearing in court is an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond (A. 38).

The State of Georgia filed its Appeal from the Trial Court's judgment and Order on October 8, 1969 (A. 2). In its Appeal, the State presented the following questions:

(1) Whether the bond-posting requirement of Ga. Code Ann. §61-303 is violative of any right secured to tenants, and in particular indigent tenants, by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution or by the equivalent provisions of the Constitution of the State of Georgia.

(2) Whether the "double rent measure of damages fixed by Ga. Code Ann. §61-305 is violative of any right secured to tenants, and in particular indigent tenants, by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution or by the equivalent provisions of the Constitution of the State of Georgia.

On January 23, 1969, the Georgia Supreme Court rendered the judgment from which Appellants have appealed (A. 43). Their opinion concludes that: "Code §§61-303

and 61-305 do not violate the Fourteenth Amendment to the United States Constitution (Code §1-815) nor the corresponding provisions of the Georgia Constitution (Code §§2-102, 2-103, 2-104, Art. I, Sec. I, Paras. 2, 3, 4 Const. 1945)" (A. 40). The Court further held that:

> the Trial Court erred in holding that Ga. Code §§61-303 and 61-305 were unconstitutional, in allowing the tenants to file their counter-affidavits without first posting the bond required by Code §61-303, and in holding that the tenants be permitted to assert their defenses without being subjected to the double rent provisions of Code §61-305 (A. 43).

The Georgia Supreme Court denied Appellants' request for rehearing on February 18, 1969 (A. 44), rendering final that Court's ruling and bringing Appellants' case within the provisions of 28 U.S.C. §1257(2). Appellants filed Notice of Appeal in the Georgia Supreme Court on February 20, 1969 (A. 2), and filed their jurisdictional statement on April 23, 1969 (A. 2).

This Court noted probable jurisdiction on June 23, 1969 (A. 45).

Summary of Argument

The Georgia eviction statutes permit a landlord to evict a tenant by the simple expedient of obtaining a dispossessory warrant which authorizes a Marshal to evict a tenant summarily unless the tenant files a counter-affidavit stating that he has a right to remain in possession. In order to file such a counter-affidavit, the tenant must post

with the court a bond equal to double the amount of rent "reserved or stipulated to be paid."

This procedure violates the Equal Protection Clause because it discriminates against tenants with valid defenses to a dispossessory action as well as those who are illegally holding over.

The statute also discriminates against the entire category of tenants, as opposed to landlords and other litigants, by requiring only tenants to post a bond as a precondition to the right to appear in court. Such a requirement is not justified by any valid state purpose.

The discrimination effected by the statute is particularly harsh when the tenant is indigent. This Court has held, in a long series of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), that statutory classifications based on wealth or property are "traditionally disfavored" and has further held that where the classification impinges upon a "fundamental right" the State will be required to justify the classification not merely by a showing of a reasonable basis for its enactment but by a "compelling" state interest. No compelling state interest has been shown to justify Ga. Code Ann. §§61-303 and 61-305.

The statutes not only violate the Equal Protection Clause; they also deny to Georgia tenants the Due Process of the laws by depriving tenants of their property without a hearing. This Court's recent decision in *Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520 (U.S. June 10, 1969) held that a prejudgment taking of wages was an illegal deprivation of property; the deprivation of housing without a hearing is at least as serious as the deprivation in *Sniadach*, and should be struck down under the doctrine in that case.

The statute also runs afoul of the Due Process Clause in that it denies to tenants the right to litigate protected by that clause, and by this Court's decision in the *Button, Railroad Trainmen,* and *United Mineworkers* cases. Finally, the statute's requirement of a bond equivalent to "double the rent reserved or stipulated to be paid" is so vague that men of common intelligence must necessarily guess at its meaning. This vagueness is an unconstitutional denial of the due processs of the laws.

ARGUMENT

POINT I

Georgia Code Annotated §§61-303 and 61-305 Arbitrarily Discriminate Against All Tenants in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United State Constitution.

The State of Georgia has the most oppressive summary eviction law in the United States, for Georgia is the only State in the Union that permits landlords to evict tenants summarily while requiring tenants to post a penal bond in order to be heard in court to contest the summary eviction.*

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* Two other jurisdictions require tenants to post a bond in order to defend against an eviction, but the statutes in both of those jurisdictions are considerably narrower than Georgia's provisions.

Massachusetts requires a bond; but only if there has been a foreclosure of a mortgage.

> Mass. Gen. Laws Ch. 239 §6. Condition of Bond in Action for Possession after Foreclosure. If the action is for the possession of land after foreclosure of a mortgage thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land

Under the laws of Georgia, the owner of lands or tenements may evict a tenant by the simple technique of ordering the tenant to vacate, and then, at the expiration of a statutory notice period, signing an affidavit declaring that the landlord has a "right" to the premises. Ga. Code Ann. §61-301. The landlord's unsupported affidavit is the Marshal's authority to order the tenant to move; if the tenant has not moved at the end of four days (six days in Fulton County), Georgia law permits the Marshal to remove him physically.

A tenant wishing to contest this summary eviction is faced with a complicated, expensive, and risky procedure. He may not simply answer the landlord's affidavit by a counter-affidavit asserting his own rights and claims: before he can even be heard by a court, he must tender "a

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from the day when the mortgage was foreclosed until possession of the land is obtained by the plaintiff . . . . Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond.

§6A. Condition of Bond in Action for Possession after Foreclosure of Tax Title. If the action is for the possession of land after foreclosure of a tax title thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the day when the tax title was foreclosed until possession of the land is obtained by the plaintiff, and of all damage and loss which he may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during such withholding.

Nevada requires a bond; but only if the landlord also posts a bond.

Nev. Rev. Stat. §40.300, provides for the issuance of a "temporary writ of restitution." This writ, however, is not issued until the tenant-defendant has been given an opportunity to oppose its issuance, nor until the landlord-plaintiff has filed a sufficient bond of indemnification in an amount fixed by the Court. Nev. Rev. Stat. §40.300,3.

bond with good security, for the payment of such sums, with costs, as may be recovered against him on the trial of the case." Ga. Code Ann. §61-303. Should he subsequently lose his case on the merits, he must pay to the landlord "double the rent reserved or stipulated to be paid." Ga. Code Ann. §61-305. In Fulton County, this statute operates in practice to require a "100% cash bond" (A. 14) equivalent to double the amount of rent that may become due during the period of the litigation, a period arbitrarily defined by the Clerk of the Civil Court of Fulton County as six months.

Thus, a tenant in Fulton County must post a cash bond equal to one full year's rent in order to raise *any* defense against a dispossessory warrant. Should the tenant be unable to post the bond, he has six days from the day he is served to leave the premises or be physically set out by the Marshal.

That this procedure discriminates against all tenants in relation to all landlords is immediately apparent.

A rich tenant with a valid defense to an eviction notice, for example, is discriminated against by the statute because even if he wins his case (indeed, even if the landlord has brought his action in bad faith, has been stubbornly litigious or has caused the tenant unnecessary trouble and expense) he must incur the expense of obtaining a bond and engaging counsel. Even where the tenant's defense is absolute and is sustained by a motion for judgment on the pleadings, an Atlanta tenant, be he individual or corporate, must provide the enormity of a cash bond equivalent to one full year's rent before asserting such a defense. The loss of income suffered by any litigant who must produce

such a sum of money is an important facet of the discrimination created by the statute.

A rich tenant in Georgia may possibly be able to defend himself in a dispossessory action—if he is absolutely certain that he will prevail. But even the richest tenant does not dare go to court in a contested case, for the possible loss of a year's rent is a sanction so dire that it must preclude litigation by all but the most reckless tenants. Needless to say, only a foolhardy attorney would advise his client to litigate under such conditions, although the client's defense might be entirely colorable and supported by a preponderance of the evidence.

If these considerations apply to a rich tenant, how much more conclusively do they apply to a tenant whose funds are limited. An Atlanta family that pays $300 rent for a three bedroom apartment, for example—a solid, middle-class family with the normal financial pressures to which such a family is subject—is obviously in no position to produce $3,600 plus a bonding company's fees before defending a lawsuit, no matter how just might be the family's defense. And a resident of Vine City, one of Atlanta's worst slum areas, need not give a second thought to presenting any defenses in court: he moves out, and moves out fast, or he finds himself moved out by the County Marshal.

As these facts make clear, Georgia's statute discriminates not only against tenants who wrongfully hold over, or those who hold over with a claim of right that is later rejected by a court, but against all tenants, even those whose claim of right is upheld in litigation. And this discrimination is imposed in addition to another Georgia statute that makes

defendants liable for costs where they have litigated in bad faith.*

The first constitutional defect of the Georgia eviction statute, therefore, is the fact that it arbitrarily discriminates against all tenants, including tenants who litigate in good faith.

This Court held only last term that such discrimination is a violation of the equal protection of the laws. In *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) MR. JUSTICE BRENNAN wrote the Court's opinion holding that the one year residency requirement for AFDC eligibility imposed by all but eleven jurisdictions violated the Equal Protection Clause in that it interfered with the "fundamental right of interstate movement," and did not promote that compelling state interest necessary to justify an interference with a constitutional right.

Addressing itself specifically to the argument that a residency requirement provides the states with a safeguard against fraudulent receipt of benefits, the Court pointed out that

> Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year. *Id.* at 637.

In *Shapiro*, a State law was thus found unconstitutional when the Court determined that the law was so broad that

* Ga. Code Ann. §20-1404 states that the expenses of litigation are not generally allowed as a part of damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense, the jury may allow them.

innocent newcomers as well as potential wrongdoers were penalized by its provisions. And the Court there noted the unreasonableness of enacting a "blunderbuss" statute to prevent wrongdoing when an alternative method is available to accomplish the same result.

In the instant case a State has once again enacted a statute so broad that innocent parties (tenants with valid defenses) as well as potential wrong-doers (tenants holding over without claim of right) are penalized by its provisions. And here too, a valid alternative (Ga. Code Ann. §20-1404, providing expenses of litigation to plaintiffs victimized by bad-faith defendants) is available to prevent wrongdoing. As this court struck down the blunderbuss residency laws in *Shapiro,* so it should strike down the blunderbuss eviction laws here.

Over-breadth is not the only constitutional flaw in Georgia's eviction statute, grave though that flaw is. Georgia's statute creates at least one more discrimination that is perhaps even more constitutionally fatal, and that is the discrimination involved in restricting the right of all tenants—as opposed to all landlords and to all other litigants in Georgia—to defend themselves in court. It is this massive denial of access to the courts—a denial that affects every tenant in Georgia, be he individual or corporate, rich or poor, right or wrong—that constitutes the second, and perhaps the most constitutionally grave, defect in the Georgia eviction statute.

The opinion of Judge Osgood O. Williams in the trial of the instant case in the Civil Court of Fulton County dealt explicitly with this question, and concluded expressly that the State had selected an unconstitutional method to protect its landlords.

> Undoubtedly, it was the intent of the Legislature to protect the landlord against ill-founded or frivolous claims of the tenant. . . .
>
> In relation to conditions precedent, the courts have held as long as the basis of distinction is real and the condition imposed has a reasonable relation to a legitimate object, the State may without violating the Equal Protection Guaranty prescribe a reasonable and appropriate condition precedent to the bringing of an action of a specified kind or class which includes requiring the execution of a bond under certain circumstances. . . . Basically the Equal Protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the Constitutional requirement, when its courts are open to all with like rules and modes of procedure, for the security of their persons and property and the prevention and redress of wrongs. Equal Protection of the Law means that Equal Protection and security are given to all and this specifically includes the exemption from any greater burden or burdens that are imposed upon all others under like circumstances. (A. 31, 32)

Judge Williams' decision is not only well reasoned; it is supported by a long line of decisions that have held conclusively that

> The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. *Gulf, C.&S.F. Ry.* v. *Ellis*, 165 U.S. 150, 162 (1896), quoting *Wilder* v. *Chicago & W.M. Ry.*, 70 Mich. 382, 384 (1888).

In *Hocking Valley Coal Co.* v. *Rosser,* 53 Ohio 12, 41 N.E. 263 (1893), for example, the Ohio Supreme Court declared unconstitutional a statute that allowed attorneys' fees for successful wage claimants but created no reciprocal right on the part of successful defendants. In validating the statute, the court said:

> Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney fee, if an honest but unsuccessful defense should be interposed? *Id.* at 19; 41 N.E. at 264.

The court concluded:

> We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective right. . . . Where the penalty has been imposed for some tortious or negligent act, the statute has generally, though not always, been sustained; but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Id.* at 20; 41 N.E. at 265.

And in *Davidson* v. *Jennings,* 27 Colo. 187, 60 P. 354 (1900), the Colorado Supreme Court struck down a similar attorneys' fee statute and said that

> Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another,

without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right [the right to be treated equally in the enforcement and defense of legal rights] by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. *Id.* at 190; 60 P. at 356.

This Court's most lucid enunciation of the theory articulated by Judge Williams and by the courts in the above cases may have been in *Gulf, C.&S.F. Ry., supra.* In striking down a statute that required railroads to pay attorneys' fees and court costs under certain circumstances but did not impose the same requirement on other litigants and did not make it possible for railroads to collect costs and fees under any conditions, the Court said that the statute was unconstitutional because it

> singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. . . . *They do not enter the courts upon equal terms.* They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties *they are discriminated against, and are not treated*

> *as others. They do not stand equal before the law.* They do not receive its equal protection. All this is obvious from a mere inspection of the statute. *Gulf, C.&S.F. Ry.* v. *Ellis,* 164 U.S. 150, 153 (1896). (Emphasis added)

Like the debtors in *Gulf,* tenants in Georgia have been singled out from all other possessors of property and are "mulcted" if litigation terminates adversely to them.*

And like the defendants in *Gulf,* defendants in the instant case are discriminated against in relation to plaintiffs, who are afforded a "special and important pecuniary advantage", *Gulf, supra,* at 162, which this court should not permit to stand.

Ga. Code Ann. §§61-303 and 61-305 do not provide a uniform remedy for landlords and tenants; i.e., landlords and tenants (1) "do not stand equal before the law" and (2) "do not enter the courts on equal terms" *Gulf, supra,* at 153. They are also discriminated against in relation to

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* It is interesting to note in this context that tenants, unlike all other Georgia possessors of property involved in litigation with owners of property, have indeed been singled out for special discriminatory treatment. Thus neither the bailment statute, Ga. Code Ann. §107-201, which deals with tangible property subject to removal from the jurisdiction, nor the intruder statute, Ga. Code Ann. §105-1501, which deals with occupants of property who have not even a colorable right to possession, permit the titleholder to recover double damages in the event of a successful recovery against a wrongful possessor. And neither of these statutes, each of which regulates the rights of owners whose property is in the hands of persons much more likely than tenants to cause damage or destruction, requires the possessor to post a bond as a precondition to going to court. A landlord thus enjoys a position of special privilege under Georgia laws which the legislature has denied to the owners of moveable, destructible personal property and to owners of land seeking to oust trespassers.

all other possessors who litigate against property owners. Finally, tenants are discriminated against under Georgia law because they must post a bond in court and suffer the attendant financial disadvantages even if they have a valid defense to an eviction action.

Appellants contend that these discriminations deny to all tenants the equal protection of the laws guaranteed by the United States Constitution. They urge this Court to so hold, and to declare unconstitutional Ga. Code Ann. §§61-303 and 61-305.

POINT II

Georgia Code Annotated §§61-303 and 61-305 Arbitrarily Discriminate Against Indigent Tenants in Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The constitutionality of the Georgia eviction statute has been considered by this Court on a previous occasion. In *Williams* v. *Shaffer,* 385 U.S. 1037 (1967) the Court denied a petition for certiorari from the Supreme Court of Georgia's decision upholding the constitutionality of the statute because the tenants in that case, unlike the tenants in the instant case, had moved from the leased premises, rendering the case moot. In dissenting from the Court's denial of certiorari, MR. JUSTICE DOUGLAS described Georgia's law by stating that

> This case involves an important question regarding the right of a poor tenant to remain in possession of his shelter and defend against eviction in a court of law. It is part of the larger problem regarding the inability of indigent and deprived persons to voice

> their complaints through the existing institutional framework, and vividly demonstrates the disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause. *Williams* v. *Shaffer*, 385 U.S. at 1037 (dissenting opinion of Mr. Justice Douglas with whom Chief Justice Warren concurred).

MR. JUSTICE DOUGLAS' observation that the Georgia statute "vividly demonstrates" the denial of equal protection to poor people is apt and accurate. For if §§61-303 and 61-305 present a serious obstacle to *all* tenants, the obstacle they present to poor tenants is simply and absolutely insurmountable. As the trial judge in the instant case stated,

> The requirement that an indigent post a bond before he is granted a hearing is an impossibility. (A. 38)

It was this issue that the court below held to be "the crux of the case now before this tribunal"—a case that

> questions the validity of *a statute that denies an indigent defendant a hearing in a dispossessory proceeding, solely on account of his poverty.* The denial of the hearing stems directly from the defendant's impoverished circumstances which make it impossible for him to provide the required statutory bond. (A. 36) (Emphasis added)

Thirteen years ago this Court began to give content to the Equal Protection Clause insofar as it limits discrimination by a state on the basis of wealth. In *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Court began with the premise that

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people

charged with crime mus
cerned, "stand on an equ so far as the law is con-
tice in every American cality before the bar of jus-
urt." *Id.* at 17.

It concluded that:

> There can be no equal ju
> a man gets depends on tice where the kind of trial
> *Id.* at 19. e amount of money he has.

On the basis of these princi
indigent state prisoner coul les this Court held that an
transcript, the transcript b not be denied a free trial
to appellate review of his ng in effect a prerequisite
Roberts v. *LaVallee*, 389 U onviction. And recently, in
affirmed *Griffin* with a broad . 40 (1967), this Court re-
the question of equal justice f statement of its position on

> Our decisions for more r indigents in criminal cases:
> clear that *differences i*
> *needed to vindicate lega* an a decade now have made
> financial situation of the *access to the instruments*
> the Constitution. *Rober rights*, when based upon the
> (Emphasis added). defendant, are repugnant to

s v. *LaVallee*, 389 U.S. at 42

In *Harper* v. *Virginia Bo*
(1966), this Court indicate *rd of Elections*, 383 U.S. 663
would not be limited to crim that the doctrine of *Griffin*
the State's requirement of al prosecutions. In that case
deny equal protection to th \$1.50 poll tax was held to
to pay it and were therefore se citizens who were unable
nable to vote.

As this Court noted in *Ha*
of wealth or property, like *per*, "lines drawn on the basis
tionally disfavored," for the those of race . . . are tradi-
"introduce a capricious or ir-

relevant factor" into the statutory scheme. *Id.* at 668. Because the Virginia poll tax statute under attack in *Harper* "makes affluence of the voter or payment of any fee an electoral standard," *id.* at 666, the Court held that it violated the Equal Protection Clause.

The capricious and irrelevant factor of affluence has not only been introduced into the Georgia statutory scheme; it is the very basis of it. MR. JUSTICE DOUGLAS recognized this fact when he commented in *Williams* v. *Shaffer* that the statute's

> effect is that an indigent tenant is deprived of his shelter, and the life of his family is disrupted—all without a hearing—solely because of his poverty. 385 U.S. 1037.

Judge Williams, too, understood the effect of the Georgia statute, and held expressly that it was unconstitutional because it discriminated against poor people. He held that

> The constitutional guarantee of equal protection of the laws is not subject to a construction which allows a man of means to defend his rights in court while denying the same opportunity to the indigent. The availability of the courts is necessarily open to all—both rich and poor alike. Equal protection of the laws does not permit as a condition precedent for access to the machinery of the courts a bond which a defendant is without means to procure (A. 38).

In *Harper* this Court described classifications based on wealth as "traditionally disfavored," and there held such a requirement "an 'invidious' discrimination . . . that runs afoul of the Equal Protection Clause". 383 U.S. at 668.

Similarly, the Court has

> long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670.*

As this Court recently stated, where a classification "touches on [a] fundamental right . . . its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969).

The Court's position on these two questions—the questions of "traditionally disfavored" categories and classifications that interfere with fundamental rights—has been summarized by the Harvard Law Review as follows:

> Thus, the cases indicate that when a fundamental interest is impaired or a suspect distinction drawn, the Court will demand a convincing demonstration that the classification is well tailored to achieve the statutory objective. . . . The State must show at least that this classification is more than just one of its goals. *Developments in The Law: Equal Protection*, 82 Harv. L. Rev. 1065, 1122 (1969).

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* *See also, Levy* v. *Louisiana*, 391 U.S. 68 (1968):

> [W]e have been extremely sensitive when it comes to basic civil rights (*Skinner* v. *Oklahoma*, *supra*, at 541; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669-770) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (*Brown* v. *Board of Education*, 347 U.S. 483; *Harper* v. *Virginia Board of Elections*, *supra*, at 669.) 391 U.S. at 71.

The blatant discrimination effected by these statutes was underscored by the trial judge when he noted that

> The uncontradicted evidence in these proceedings show that the *defendants are indigent and unable to obtain bonds;* this situation takes on increasing importance when considered in the light of the evidence that during the year 1967 more than 19,000 dispossessory warrants were issued in Fulton County and the fact that defenses were actually interposed in merely 13 instances (A. 38). (Emphasis added.)

As Mr. Justice Douglas observed when Georgia's eviction statute appeared here last in *Williams* v. *Shaffer,* the Georgia eviction statute clearly creates that kind of "traditionally disfavored classification" that the Court discussed in *Harper.* Mr. Justice Douglas' observation is made all the more striking when read in connection with Judge Williams' opinion, in which the court made the specific finding that "the requirement that an indigent post a bond before he is granted a hearing is an impossibility." (A. 38) Because this case involves both a "traditionally disfavored" category *and* a "fundamental right" protected by the Due Process Clause, it is apparent that the case is a perfect example of the kind of case in which the state should be made to demonstrate, not merely a rational relationship between its statute and the law under attack, but that kind of compelling state interest that was found *not* to exist in *Shapiro, Skinner* and *Harper.*•

• Only once has this Court found a state interest sufficiently compelling to allow the state to encroach upon recognized fundamental rights. *Korematsu* v. *United States,* 323 U.S. 214 (1944); *see also, Hirabayashi* v. *United States,* 320 U.S. 81 (1943). Ap-

In the instant case, this Court need look no further than the opinion of the Supreme Court of Georgia below to understand the purpose of Georgia's statute. According to that court, the "main purpose" of the statute

> is to restore the landlord to the possession of the premises, and the imposition upon the tenant of a liability for double rent is an incident to the proceeding, and is in the nature of a penalty inflicted upon him for the wrong he has committed in refusing to deliver possession of the premises after demand is made upon him. *Willis* v. *Harrell,* 118 Ga. 906, 910, 45 S.E. 794, 795 (1903).

The question presented to this Court is therefore a simple one: is the State's interest in penalizing a tenant "for the wrong he has inflicted in refusing to deliver possession of the premises after demand is made upon him" so compelling that this Court should permit the State of Georgia to deny to indigents the fundamental right of access to the courts, and so compelling as to permit this Court to authorize Georgia to create a classification that effectively prevents indigents from challenging evictions?

Appellants submit that the State has not shown, and indeed could not show, any compelling justification for the enactment of the statutes here in question. Appellants submit in fact that there is not only no compelling interest to justify Georgia's eviction statute, but there is not even a rational relationship between the State's legitimate right to protect landowners from tenants holding over illegally

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pellants submit that Georgia's interest in protecting landlords is less compelling than the national interests that were at stake in the middle of the Second World War.

and the overkill it has employed in these laws. Accordingly, Appellants respectfully urge this Court to hold the statutes unconstitutional as a denial of the equal protection of the laws to all tenants, and in particular, as a denial of the equal protection of the laws to indigent tenants.

POINT III

Georgia Code Annotated §§61-303 and 61-305 Unconstitutionally Deny to Tenants in Georgia the Due Process of Law as Guaranteed by the Fourteenth Amendment to the United States Constitution.

A. The Georgia Statutes Deprive Tenants of Their Property Without the Procedural Right to Be Heard Guaranteed by the Due Process Clause.

The Fourteenth Amendment to the United States Constitution forbids any State to "deprive any person of life, liberty, or property without due process of law."

The crux of due process theory is that certain rights which are recognized as fundamental may not be restricted by the State in an arbitrary or unreasonable manner. *See, Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *NAACP* v. *Alabama,* 360 U.S. 240 (1959); *Adamson* v. *California,* 332 U.S. 46 (1947); *Betts* v. *Brady,* 316 U.S. 455 (1942); *Palko* v. *Connecticut,* 302 U.S. 319 (1937). The standard test for determining whether a given right is fundamental requires a determination of whether the right is within the basic values "implicit in the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U.S. at 325 (Mr. Justice Cardozo). This requires

a balancing of the importance of the right to the individual against the relevant state interests. The question is whether

> the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932).

The "right to be heard" before judgment is a right that is fundamental to our entire concept of due process. *Schroeder* v. *New York*, 371 U.S. 208, 212 (1962). The case at bar poses the specific question: may a tenant be deprived of his shelter without being given the right to be heard.

Judge Williams in the court below recognized the fact that a Georgia tenant is wholly denied this right when he said:

> The Statute which requires a bond before appearing in court is an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond. (A. 38).

For Judge Williams, the question of whether litigants are entitled to a hearing before judgment was not new. As he stated,

> It is the same question asked by St. John, 7:51, "Doth our law judge any man, before it hear him and know what he doeth?" (A. 38).

He answered the question by

> the rule of natural reason, expressed by Seneca 2,000 years ago:

> Qui statuit aliquid, parte inaudita altera, Aequum licet statuerit, haud aeguus fuit—He who determines any matter without hearing both sides, though he may have decided right, has not done justice. (A. 37). *See also, Hovey* v. *Elliott,* 167 U.S. 409 (1897).

The Civil Court of Fulton County is the court in which the vast majority of dispossessory warrants in Fulton County are brought. Judge Williams was thus well situated to observe the effect and operation of the statutes here in question. It is revealing indeed that a judge so placed felt compelled to hold these provisions inconsistent with the requirements of due process.

Judge Williams' opinion, courageous though it was, does not represent a novel point of view. This Court only last term provided strong support for the low-income would-be-litigant who is deprived of his property without the right to be heard.

In *Sniadach* v. *Family Finance Corporation,* —— U.S. ——, 37 U.S.L.W. 4520 (1969), this Court struck down a Wisconsin garnishment statute that allowed a debtor to be deprived of his wages before being afforded a hearing. The Court held that the debtor was unconstitutionally deprived of his earned wages, and that a prejudgment garnishment was "a taking of property without that procedural due process that is required by the Fourteenth Amendment." *Id.* at —, 37 U.S.L.W. at 4521.

Wisconsin's garnishment statute only deprived the debtor of the enjoyment of his wages temporarily, for that statute made a hearing available to the debtor as a matter of right *after* the initial garnishment action. Georgia's

double bond provisions, however, permanently and finally divest the tenant of his property.

In *Sniadach,* the Court found:

> that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage earning family to the wall. *Id.* at —, 37 U.S.L.W. at 4521.

In the instant case, the taking may as a practical matter not only drive a family to the wall, it will drive them out from under their roof as well, and into the very streets of our cities and towns.

Mr. Justice Douglas, writing for the Court in *Sniadach,* explicitly dealt with the fundamental nature of wages, "a specialized type of property presenting distinct problems in our economic system," and noted that "a prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support." *Id.* at —, 37 U.S.L.W. at 4520. Mr. Justice Douglas was especially concerned with the "grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking." *Id.* at —, 37 U.S.L.W. at 4521.

This language is particularly applicable to the instant case, for there is no property that poses more "distinct problems in our economic system" than shelter for one's family—"The greatest material need of the poor" *—and no injustice more grave than the taking of this shelter with no hearing at all.

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* P. Wald, Law and Poverty 1965, 12 (Report to the National Conference on Law and Poverty, Washington, D. C., June 23-25, 1965).

The United States Congress first recognized the fundamental importance of housing with the passage of the Housing Act of 1949, wherein Congress expressly declared that one of America's national goals was to make available "a decent home and suitable environment for every American family." (Act of July 15, 1949, Ch. 338, 63 Stat. 413.) In introducing legislation in 1968 to achieve that still-unaccomplished goal, President Lyndon Johnson noted that "five Presidents and fifteen Congresses" have dealt with the problems of housing and urban development, starting

> in 1937, when Franklin Roosevelt saw a third of the nation ill-housed. He and the 75th Congress recognized that poor families could not, with their own resources, afford homes on the private market, and that some form of Government help was necessary if they were to have decent shelter. The result was the historic legislation that launched the Public Housing Program.

President Johnson pointed out that every subsequent administration had honored President Roosevelt's 1937 commitment:

> Twelve years later, with the Housing Act of 1949, President Truman and the 81st Congress started urban renewal and pledged "as soon as feasible . . . a decent home and a suitable living environment for every American family."
>
> In the 1954 Housing Act, President Eisenhower and the 83rd Congress expanded the program of urban renewal.
>
> At the beginning of this decade, President Kennedy and the 87th Congress enlarged the Government's role to bring decent houses into the reach of families with

moderate income. President's Message of February 22, 1968, *Houses and Cities,* U.S. Code Cong. and Admin. News, No. 2, 520 (April 5, 1968).

Most recently, the House of Representatives Committee on Banking and Currency underlined its belief in the fundamental importance of housing when it stated, in reporting out the Housing Act of 1968:

> The Housing and Urban Development Act of 1968 as approved by the committee reaffirms our national housing goals and makes extensive modifications and additions to our housing programs to accelerate progress. Since the declaration in the 1949 act that our national objective was "a decent home and a suitable living environment for every American family" our country has invested heavily in the production of housing for low and moderate income families and in the improvement of our towns and cities. H. R. Rep. No. 1585, 90th Cong. 2d Sess. (1968); reprinted at 2 U.S. Code Cong. and Admin. News 2873 (90th Cong. 2d Sess. 1968)

The House Committee noted, in language that is particularly relevant to the instant case, that

> A basic factor in the magnitude and urgency of our present housing problems has been the failure to include all parts of our population in the general rise in incomes and wealth. In fact this growth of prosperity has accentuated and may have even widened the gap between the poverty of the approximately 6 million families who still live in substandard housing and the affluent majority. Because of this contrast and the

> unrest it has created, the task of our housing and urban development programs is more critical than ever. *Id.* at 2873, 2874.

Like Presidents and Congressmen, writers and scholars have also underlined the fundamental importance of housing in our national life. Focussing on the psychological effects of housing, for example, Professor Alvin Schorr has noted that

> The evidence makes it clear that housing affects perception of one's self, contributes to or relieves stress and affects health. In myriad ways, housing affects ability to improve one's circumstances . . . . A. SCHORR, SLUMS AND SOCIAL INSECURITY 3 (1966).

Professor Schorr also observed (citing a recent study by the New York University Center for Human Relations and Community Studies) that

> Housing . . . has represented much more than physical structures. Housing is . . . a subject of highly charged emotional content: a matter of strong feeling. It is the symbol of status, of achievement, of social acceptance. It seems to control, in large measure, the way in which the individual, the family, perceives him/itself and is perceived by others. SCHORR at 9 (Report of the Chelsea Housing and Human Relations Cooperative Project 60 (1960)).

And focussing on the importance of housing for poor people—as have many other commentators*—Professor

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* *See, e.g.*, M. HARRINGTON, THE OTHER AMERICA (1962); PERMAN, THE GIRARD STREET PROJECT (1964) (Report to All Souls Unitarian Church, Washington, D. C.); P. WALD, LAW AND POV-

Carl Scheier has concisely summed up the situation by stating that

> The person with inadequate means, seeking a suitable family dwelling in the city, is often a hapless figure. Space can be had only on a short-term basis, and most available housing is run-down, dirty, and without adequate services. Furthermore, if the community is progressive and in the throes of redevelopment, one never knows when the neighborhood will be slated for wholesale destruction. Hence, many poor families are little better than transients within the metropolis, resettling periodically in one blighted area or another.*

As these commentators, Congressmen, and Presidents of the United States have pointed out, there is scarcely an area of American life as fundamental as that of housing. Their observations demonstrate that a tenant's interest in his home is more than a simple property right. Rather it is a right that involves "a specialized type of property," one that presents severe problems not only for our economic system but for our social system as well. *See Sniadach* v. *Family Finance Corp.*, —— U.S. ——, 37 U.S.L.W. 4520 (1969). And if, as the Court observed in *Sniadach*,

> A prejudgment taking of the Wisconsin type may impose tremendous hardship on wage earners with families to support, *Ibid*,

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ERTY, 1965; Rostow, The Social Effect of the Physical Environment, 27 J. of American Institute of Planners 127 (1961); *See generally*, Housing for the Poor: Rights and Remedies (1967) (Project on Social Welfare Law, N.Y.U. School of Law).

* C. Scheier, Protecting the Interests of the Indigent Tenant: Two Approaches, in THE LAW OF THE POOR 346 (J. tenBroek, ed. 1966).

the staggering hardship imposed on families who are evicted with no opportunity to defend themselves can scarcely be described.

It is interesting to observe in this context one aspect of the social consequences of Georgia's oppressive eviction law. Because Georgia's law makes it impossible for tenants to challenge a landlord's demand for the instant possession of his property, tenants in Georgia have been largely unable to raise any serious challenge to the continued existence of slums. Such a challenge, whether it takes the form of reports to City inspectors of housing code violations or utilizes any of the other techniques tenants elsewhere in the country have developed to force landlords to meet their legal responsibilities, it is impossible in Georgia.

Fear of retaliatory evictions makes tenants unable to assert their rights—or even to ask local government officials to enforce local housing codes—and leased housing thus remains in disrepair for generations. The Georgia eviction statute is at least partially responsible for the fact that Atlanta has one of the highest percentages of substandard housing of any large city in the country.*

Sections 61-303 and 61-305 make it possible for landlords to evict tenants summarily and make it effectively impossible for tenants to obtain a hearing to contest their eviction. Because this Court has held that the Due Process Clause requires a hearing before depriving any person of

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* In 1960, the Housing and Home Finance Agency found that, in the 20 American cities with the largest non-white population, 25.6% of the total non-white occupied rental units were substandard. Atlanta's percentage of non-white occupied substandard rental units was among the highest in the country at *42.4%*. Fossum, *Rent Withholding and the Improvement of Substandard Housing*, 53 Calif. L. Rev. 304, 307 n. 14 (1965).

his property, Appellants urge this Court to hold unconstitutional Ga. Code Ann. §§61-303 and 61-305.

B. The Georgia Statutes Deprive Tenants of the Fundamental Right to Litigate Guaranteed by the Due Process Clause.

One of the rights specifically protected by the First Amendment to the U. S. Constitution is the right of the people "to petition the Government for a redress of grievances." See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276-77 (1964) and cases there cited.

In a series of recent cases, this Court has recognized that litigation is a form of petition for judicial redress of grievances. Beginning with *NAACP* v. *Button*, 371 U.S. 415 (1963) this Court made clear that the right to repair to the courts for a resolution of grievances is included within the freedoms of expression protected against federal and state intrusions. Indeed,

> [U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances. 371 U.S. at 430.

In *Button* the NAACP's activities in advising Negroes of their constitutional rights, encouraging the assertion of such rights through litigation and providing lawyers and financing for the conduct of the litigation, was held more important than Virginia's interest in regulating the practice of law. The Court referred to First Amendment rights to enforce constitutional rights through litigation (371 U.S. at 440), and its opinion emphasized the importance of litigation as a "means for achieving the lawful objectives of

equality of treatment by all governments, federal, state and local. . . ." 371 U.S. at 429.

Subsequently, in *Brotherhood of Railroad Trainmen* v. *Virginia Bar,* 377 U.S. 1 (1964), the Court vindicated the right of a labor union to advise injured members to obtain legal representation and to recommend specific lawyers to provide the representation.

The litigation concerned in the *Trainmen* case was not of constitutional scale; it was not the kind of "political expression," the Court found present in *Button,* 371 U.S. at 429. It merely involved suits for money recovery, for damages suffered. Yet there too the Court held:

> The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. *The right to petition the courts cannot be so handicapped. Trainmen,* 377 U.S. at 7. (Emphasis added.)

In *United Mine Workers* v. *Illinois Bar,* 389 U.S. 217 (1967), this Court dealt with an attempt by the Illinois Supreme Court to restrict the decisions in *Trainmen* and *Button.* In rejecting the Illinois court's narrow interpretation of those cases, this Court stated:

> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. 389 U.S. at 222.

The Court noted that these rights were endangered as much by "indirect restraints" as by laws specifically prohibiting

their exercise, and said that even legislation "enacted for the purpose of dealing with some evil within the State's legislative competence . . . [and] in fact provid[ing] a helpful means of dealing with such an evil" cannot be sustained if it "actually affect[s] the exercise of these vital rights." 389 U.S. at 222.

Invoking these principles, the Court squarely held

> that the freedom of speech, assembly, and *petition* guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights. 389 U.S. at 221-22. (Emphasis added.)

Button, Trainmen and *United Mine Workers* establish the existence of a Federal constitutional right, protected by the First and Fourteenth Amendments, to litigate, to petition the courts for a redress of grievances.

Appellants do not contend that the right to litigate knows no bounds. This right is, however, of sufficient importance to require a state to show (1) a compelling State interest in order to deny the right, and (2) that denial of the right is not "pursued by means that *broadly* stifle fundamental personal liberties." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); and *See Bates* v. *Little Rock,* 361 U.S. 516 (1960).

The interests propounded by the State in the instant case are not of sufficient importance to allow for blanket denial of the right to litigate for all tenants. Protection of the landlord's interest in continued rent collection can be achieved by a restriction far narrower than one which excludes from the courts those who cannot purchase a double bond. Thus, the legislature and the courts have too broadly restricted the right to litigate in eviction actions.

Appellants respectfully urge this Court to hold that this unreasonable and arbitrary denial of a fundamental right —the right of access to the courts—is prescribed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

C. The Georgia Eviction Statutes Set Out a Vague and Incomprehensible Standard Allowing for Drastic Differences in Interpretation, in Violation of the Due Process Clause.

Georgia Code Section 61-305, when read in conjunction with Section 61-303, requires as a precondition to the tenant's defending a summary eviction a bond equal to "double the rent reserved or stipulated to be paid." This language, which has never been interpreted by a Georgia court, provides no intelligible criteria for the amount of money or the period of time the bond is to cover. Thus, the amount of the bond is left in the frequently arbitrary hands of court clerks, sheriffs and justices of the peace.

In Fulton County, as a general rule, the clerk of the Civil Court demands a bond to cover double the rent that will accrue during the six months after the bond is filed—an amount equal to one full year's rent. In DeKalb County, the tenant must supply an open-ended bond, i.e., a bond that will remain indefinite as to time and amount until final judgment is rendered.

The practice in Chatham County, however, best illustrates the confusion created by Georgia Code §61-305. In Chatham, both the Municipal Court and City Court of Savannah have jurisdiction over summary eviction actions. While the Municipal Court requires an open-ended bond similar to DeKalb's, the City Court demands that the bond

cover only double the amount allegedly due at the time the bond is sworn out. Thus, two courts in the same jurisdiction* have reached drastically different conclusions as to the meaning of statutory language.

Not only does the language of the statute allow varying interpretations as to time and amount, it also fails to specify who is to make the interpretation. In Fulton and DeKalb Counties, the amount of bond is determined by court clerks, while in Gwinnett and Chatham Counties the county sheriff makes the determination. Every aspect of Georgia's eviction statutes is open to conflicting constructions.

The classical test for vagueness was promulgated in *Connally* v. *General Construction Co.*, 269 U.S. 385, 392 (1926), wherein MR. JUSTICE SUTHERLAND said:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

The Georgia laws that make possible the boundless administrative discretion described above clearly do not afford the "first essential of due process of law."

Although the majority of cases declaring statutes void for vagueness have involved criminal and regulatory provisions, this Court has not hesitated to extend the requirement of definiteness to civil matters. In *NAACP* v. *Button*, 371 U.S. 415 (1963), MR. JUSTICE BRENNAN rejected the

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* In fact, both courts are located in the same building in Savannah.

notion that the void for vagueness doctrine did not apply because of the "civil" nature of the anti-solicitation statute, saying:

> It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. 371 U.S. at 432.

And in *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), this Court struck down a statute allowing a jury to assess costs against a defendant acquitted of misdemeanor charges, because the statute lacked definite standards to govern the jury's determination. MR. JUSTICE BLACK, writing for the majority, squarely met the argument that collection of costs was a civil matter and stated that:

> Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to foster upon its conduct or its statute. So here this state Act whether labelled "penal" or not must meet the challenge that it is unconstitutionally vague. 382 U.S. at 402.

Any statute, either civil or criminal, "must be one that carries an understandable meaning with legal standards that courts must enforce." *Giaccio,* 382 U.S. at 403. MR. JUSTICE FRANKFURTER, concurring in *Brown* v. *Allen,* 344 U.S. 443 (1953), was emphatic in his demand for such standards.

> [D]iscretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged. 344 U.S. at 496.

The criteria for the exercise of discretion must not be "merely a shelter for . . . judges [or, in the instant case, county sheriffs] to respond according to the individual will," for,

> Discretion without a criterion for its exercise is authorization of arbitrariness. *Ibid.*

The language of Georgia Code §61-305, requiring a bond equal to "double the rent reserved or stipulated to be paid," fails to set out any legal standards that courts can enforce. While this provision confers upon sheriffs and court clerks, instead of juries as in *Giaccio,* boundless discretion as to the amount a litigant can be deprived of, the result is equally burdensome. A tenant is stripped of his property, and excluded from the courts by statutory language allowing an interpretation so unreasonable that compliance is impossible.

In *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961), this Court struck down a vague Florida statute requiring a state employee to swear that he had not in the past and would not in the future give aid and support to the Communist Party. After holding that such conduct is constitutionally protected under many circumstances, MR. JUSTICE STEWART said:

> The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. 368 U.S. at 287.

MR. JUSTICE STEWART was directly referring to First Amendment freedoms, which traditionally have demanded

zealous protection when lack of certainty threatens to inhibit their exercise. Cf. *American Communications Association* v. *Douds*, 339 U.S. 382 (1950); *NAACP* v. *Button*, 371 U.S. 415 (1963). This requirement, however, is no less necessary where the threatened right involves access to the courts, a fundamental liberty affirmatively protected by the Constitution.

Appellants contend that Georgia Code §61-305 consists of meaningless language setting forth no legally enforceable standards, and is thus void for vagueness under the Due Process Clause of the Fourteenth Amendment.

Conclusion

For the foregoing reasons, Appellants respectfully request this Court to reverse the judgment of the Georgia Supreme Court and remand the cases herein to the Civil Court of Fulton County for trial on the merits.

Respectfully submitted,

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August 5, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 25

LELIA MAE SANKS, NEE JONES, et al *Appellants*

vs.

STATE OF GEORGIA, et al, *Appellees*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

[redacted] THE LEGAL AID OFFICE OF SAVANNAH, INC. [redacted] BRIEF AMICUS CURIAE ON BEHALF OF APPELLANTS [redacted]

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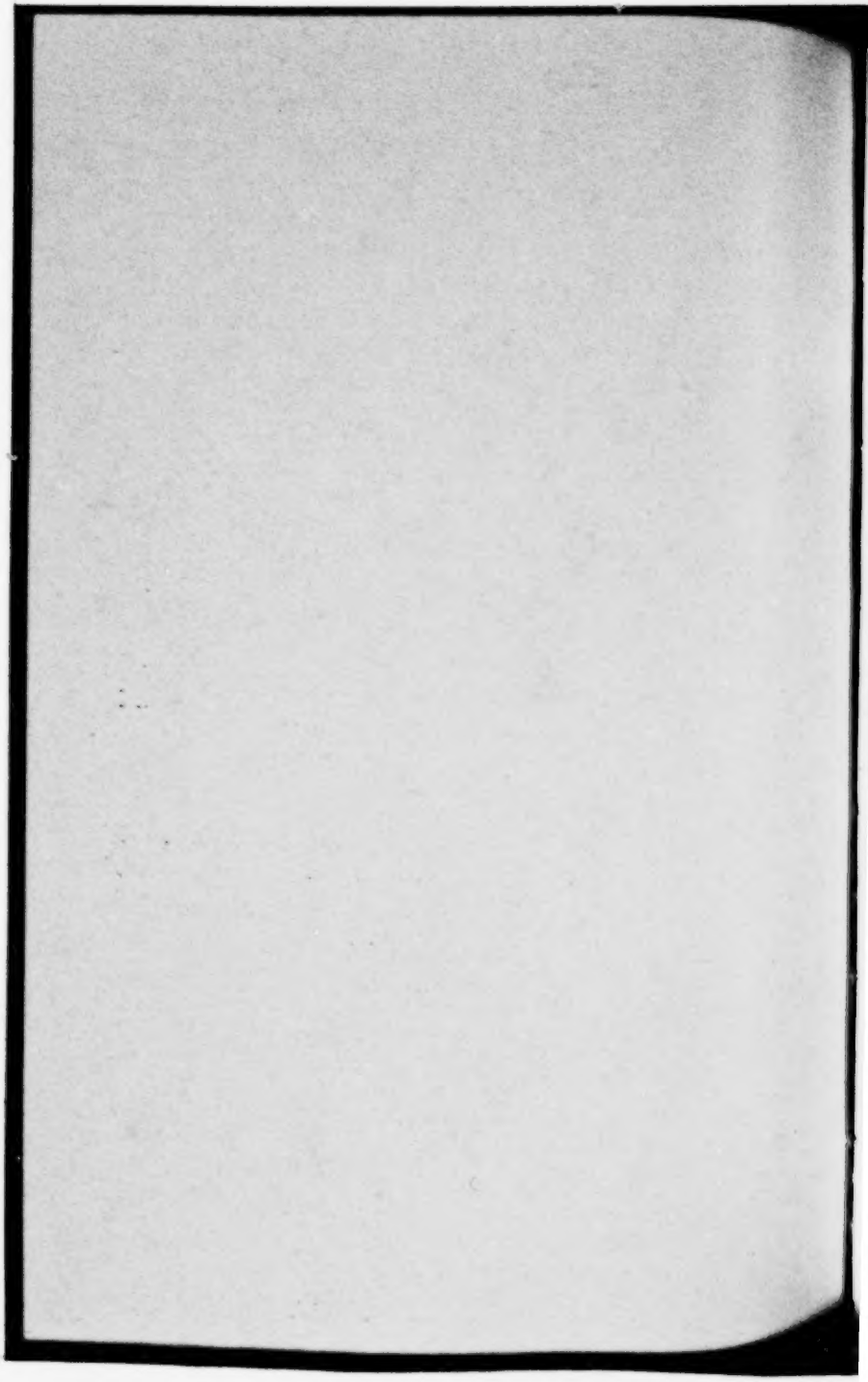

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 266

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE BY THE LEGAL AID OFFICE OF SAVANNAH, INC., ON BEHALF OF APPELLANTS

The Legal Aid Office of Savannah, Inc., respectfully moves for leave to file the attached Brief Amicus Curiae in support of the Appellants in the above-styled cause. Consent has been requested and received from all counsel.

The Legal Aid Office of Savannah, Inc. is an organization whose purpose is to represent clients in civil matters where such clients' income falls within speci-

fied eligibility requirements, with certain specified exceptions. Landlord/tenant matters are included in the type cases handled. The organization is funded under the provisions of the Economic Opportunity Act and by local contributions, primarily from the United Community Services of Chatham County, Georgia. The area served by the organization is all of Chatham County Georgia, which has a population in excess of 175,000. Included in this population are many poor people who fall within the eligibility requirements of the Legal Aid Office of Savannah, Inc. Many of these clients have landlord/tenant problems and those problems have become more acute in recent years due in part to the establishment in Chatham County, Geo[illegible] of Hunter Army Air Field which is used for train[illegible] helicopter pilots by the Army. The military personnel are for the most part temporary residents and do not, as a general rule, purchase homes; but rent homes in Chatham County during their assignment at Hunter Army Air Field. This has created a shortage of housing in Chatham County and poor tenants who have been evicted from their homes have great difficulty in securing housing.

In 1968, 1,620 dispossessory warrants were filed in Chatham County, Georgia. Of this number only six bonds were posted.

The Courts of Chatham County do not apply the same bond requirements. A tenant posting a bond under the provisions of Georgia Code Section 61-303 in the City Court of Savannah is required to post a bond in the amount double the alleged sum owed at the time the bond is posted. The Municipal Court of Savannah requires an open bond covering the amount of any

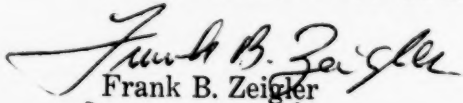
judgment that may be rendered against the tenant. In the absence of a bond, the tenant is evicted regardless of any defenses he may have to the warrant.

The bond requirements cannot be met by many indigent tenants having legitimate defenses to the warrant and by reason of their indigency are denied equal access to the courts. Movant desires to file the attached brief since indigent tenants in Chatham County, Georgia, are similarly situated and have the same problems as the indigent tenants in this case.

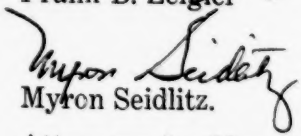
WHEREFORE, it is respectfully requested that this Motion for Leave to File a Brief Amicus Curiae be granted and the views expressed in that brief be considered by this Honorable Court.

Respectfully submitted,

LEGAL AID OFFICE OF SAVANNAH, INC.



Frank B. Zeigler



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IN THE

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BRIEF AMICUS CURIAE ON BEHALF OF APPELLANTS

INTEREST OF MOVANT

As stated in the preceding Motion, Movant is engaged in the representation of indigent clients in landlord/tenant proceedings within Chatham County, Georgia. Similar to the case in Atlanta, tenants in Chatham County, Georgia, experience great difficulty defending dispossessory proceedings due to the requirements of Georgia Code Section 61-303, requiring a bond as a prerequisite for arresting the proceedings, and Georgia Code Section 61-305, providing for double rent should the tenant not prevail. Because of their indigency they are unable to post the bond and are therefore denied equal access to the courts with those able to do so. The outcome of this case will greatly affect the ability of indigent tenants in Chatham County, Georgia, to gain access to the courts when they have legitimate defenses to dispossessory proceedings. For this reason ,this case

is of deep interest to indigent tenants in Chatham County, Georgia. They are in accord with the appellants in this case and consider it important to their well-being that this Court sustain the position of appellants.

This amicus curiae does not intend to argue all the matters which can be reasonably anticipated to be fully argued in the brief for the appellees but it is intended to argue here matters of vital interest to indigent tenants in Chatham County, Georgia, who are denied access to the courts for the purpose of presenting defenses to dispossessory proceedings due solely to their indigency.

ARGUMENT

Requirements of bond and assessment of double damages denies indigent tenants access to the Courts and violates Constitutional guarantees of due process and equal protection of the law.

The requirement of a bond as a prerequisite to the arrest of dispossessory proceedings by the tenant denies equal access to the courts by indigent tenants and violates the due process and equal protection clauses of the Federal Constitution and related State provisions.

The Georgia Statutes involved are Georgia Code Sections 61-303 and 61-305 which provide as follows:

61-303. ARREST OF PROCEEDINGS BY TENANT: COUNTER-AFFIDAVIT AND BOND. The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired; and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affiidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case.

61-305. DOUBLE RENT AND WRIT OF POSSESSION, WHEN—If the issue specified in the preceding section shall be determined against the tenant, judgment shall go against him for double the rent

reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises.

Equal access to the courts is among the most cherished human rights in our republic. The concept of equal justice to all is not limited to those persons able to meet prerequisites of an economical nature before being able to assert valid defenses. In order to insure justice for all, it is essential that persons of every economic status be allowed to assert defenses to actions brought against them. The tenants in this case are attempting to arrest dispossessory proceedings against them without complying with provisions of Georgia Code Section 61-303, requiring the posting of a bond in order to arrest such proceedings, due to their indigency and inability to obtain a surety on their bond. They contend that they have defenses to the action which they are prevented from asserting because of the bond provision with which they are unable to comply. The Fifth and Fourteenth Amendments to the United States Constitution and related provisions of the Georgia Constitution codified as Sections 2-102, 2-103 and 2-104 (Article I, Paragraphs 2, 3, and 4 of the Constitution of the State of Georgia) guarantees due process and equal protection of the laws to all citizens.

Amendment V United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Paragraph II

Constitution of State of Georgia

Code Sec. 2-102. Protection to person and property is the paramount duty of government, and shall be impartial and complete.

Article I, Paragraph III

Constitution of State of Georgia

Code Sec. 2-103. No person shall be deprived of life, liberty, or property, except by due process of law.

Article I, Paragraph IV

Constitution of State of Georgia

Code Sec. 2-104. No person shall be deprived of the right to prosecute or defend his own cause in any of

the courts of this State, in person, by attorney, or both.

The requirement of the bond in this case violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the related provisions of the Georgia Constitution in that access to the courts are denied indigent tenants, thereby prohibiting them from asserting defenses they would have and be able to assert if they had the economic means of so doing.

The provisions of Georgia Code Section 61-303 are further objectionable because the last paragraph, providing for such bond, is ambiguous and not uniformly applied in all courts of this state. Due to the wording of this provision the tenant is required to post a bond in one amount in one court and another amount in another court within the State of Georgia and indeed within the same county. The bond provision is enforced differently by the two courts handling the great majority of dispossessory proceedings in Chatham County. One court has construed the provision as one which requires a bond double the amount of the money claimed by the landlord at the time of the filing of his affidavit. Another court in the same county has construed the provision as being one which requires an open type bond, which provides for any sum which may be recovered against the tenant in the proceedings. The bond requirement in Georgia is applied differently to different persons under similar circumstances. All laws must be uniformly applied and the failure to do is a denial of equal protection of the law.

The tenant is probably the most disadvantaged con-

sumer in America, particularly in Georgia, where the bond requirement and threat of double damages virtually excludes him from presenting his defense. He is denied relief in equity in Georgia on the grounds that the statute, Georgia Code Section 61-303, provides a complete and adequate remedy against dispossessory proceedings, and the inability of the tenant because of poverty to give the required bond affords no ground for equitable interference. **Flynn et al vs. Merck, et al, 204, Ga., 420, Page 424.** (49 SE 2d 892). The Georgia court stated further in that case at **page** 425, "If an injury is sustained compensation therefor as damages in a suit at law would be an adequate remedy."

The poor tenant in Georgia is told that he has an adequate remedy at law in that he has the right to post bond and thereby arrest the proceedings. In the event he is unable, due to poverty to post such bond, he is denied access to the court and is told that resort to a suit for damages is adequate. This philosophy changes, however, when the aggrieved tenant is a person of means and able to post bond as required. In the case of **Ward v. Walker, 222 Ga. 451** (151 SE 2d 228), the tenant did post bond and filed the required affidavit to arrest the proceedings. The landlord, however, manually and without any legal process, took possession of the premises. Injunction was sought by the tenant to restrain the defendant from continuing to exclude him from possession. In that case, the Georgia Supreme Court ruled that injunction would lie and that equity would enjoin the landlord from perpetrating the wrong to which the plaintiff was deprived of the **full** (emphasis ours) protection of a statute of the state. The court further stated in that case at **Page 453:**

"Equity will enjoin the defendant from perpetrating a wrong to which the plaintiff is deprived of the full protection of a statute of the state, although the plaintiff may still have some legal redress not as adequate and complete as that of which the defendant deprives him."

"A remedy at law, to exclude appropriate relief in equity, must be complete and the substantial equivalent of the equitable relief. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." **Ward v. Walker, 222 Ga. 451, 453.** (151 SE 2d 228).

The **Ward** case exemplifies the difference between a tenant with sufficient means to post the required bond and file the counter affidavit required by Georgia Code Section 61-303, and the defendant who is unable to post the required bond due to his poverty. The person who is unable to post a bond due to his poverty is said to have an adequate remedy at law by resort to a suit for damages. Recovery of damages as he might be able to prove is not a sufficient and adequate remedy at law to a tenant who has the means of posting the required bond but, nevertheless, is evicted of possession vi et aris. There can be little doubt that a different philosophy exists based solely on the person's ability to post the bond required by the Georgia Statute.

Next to food and clothing, a man's home is his most valuable commodity, yet he can be summarily evicted with only four days notice unless he can post the required bond; (Georgia Code Section 61-306 supp.) and even then, takes the risk of suffering double damages should he not prevail. The assessing of double

damages has been upheld by the Georgia courts. **See Goff vs. Cooper, 110 Ga. App. 339,** (138 SE 2d 449), holding that double damages are assessed from the date demand for the premises is made. On the other hand, the tenant in Georgia enjoys none of the advantages given the landlord. Should he prevail, the tenant does not collect double damages. Should he succeed in posting bond, the landlord is not required to give bond to insure recovery of damages against him.

The requirement of bond as a prerequisite for staying the eviction places the tenant at a disadvantage in all phases of the landlord/tenant relationship and is not restricted to the time when rent becomes in arrears. The indigent tenant, who cannot post bond, and thereby, is denied the opportunity to assert legal defenses to eviction, is placed in a distinct disadvantage in other lease disputes.

An example of the tenant's difficulties is a covenant calling for repairs by the landlord. Should the landlord fail to make repairs as covenanted, the tenant has no remedy similar to dispossessory proceedings. In Georgia he is even denied a lien on the property for the repairs. **West View Corporation v. Thunderbolt Yacht Basin, Inc., et al. 208 Ga. 93 at Page 98.** (65 SE 2d 167):

> "We know of no statute in this state which gives the tenant a lien for improvements." **208 Ga. 93,** (65 SE 2d 167), **West View Corporation v. Thunderbolt Yacht Basin, Inc., et al.**

Such a tenant facing a landlord who is required under the terms of the lease to make repairs but fails to do so is placed in an impossible position. Georgia law renders the landlord liable for improvements placed on the

premises by his consent. **Georgia Code Section 61-111; West View Corporation v. Thunderboolt Yacht Basin, Inc., et al. 208 Ga. 93.** (65 SE 2d 167). Yet the landlord who does not make agreed repairs suffers no penalties and is in no way prevented from defending any action brought by the tenant.

It is contended that the matter of compliance with lease covenants, such as those calling for repairs, relate directly to the requirement of a bond and a threat of double damages. The landlord can afford to sit back and breach his covenants without fear of penalty while the tenant is forced to abandon his home, even though he has a good defense, unless he is financially able to comply with the stringent requirements of the Georgia bond provision. This is a constant threat to the tenant and denies him due process of law and equal protection of the laws. It is submitted that all tenants, regardless of their financial condition, should be afforded access to the court to assert their legitimate defenses to dispossessory warrants filed by landlords. Denial of his remedy renders his substantive guarantees meaningless.

SUMMARY

We make no contention that the landlord is not entitled to possession of his premises when the tenant has breached his agreement to pay rent. We do strongly contend, however, that constitutional guarantees of due process and equal protection of the laws made applicable to the states by the Fourteenth Amendment to the United States Constitution, are denied when a tenant is denied access to the courts due solely to his inability because of his poverty, to post a bond as a prerequisite to asserting his legal defenses.

Upholding the position of the Atlanta Legal Aid Society, Inc. in the **Sanks** case, will give impoverished tenants equal access to the courts and for this reason, this amicus curiae earnestly requests that their position be affirmed and the ruling by the Georgia Supreme Court in that case be reversed.

CONCLUSION

The requirements of bond from a tenant as a condition precedent to asserting a defense to a dispossessory proceeding, and assessment of double damages, is so oppressive that it denies him a remedy in court and amounts to a denial of Due Process of Law and Equal Protection of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Code Section 2-102, 2-103 and 2-104 of the Georgia Constitution. Article I, Paragraphs 2, 3, and 4, Ga. Const.)

Respectfully submitted,

Frank B. Zeigler

Myron Seidlitz

Attorneys for
The Legal Aid Office of Savannah, Inc.

CERTIFICATE OF SERVICE

I, **FRANK B. ZEIGLER,** of counsel for the above mentioned Amicus Curiae, certify that I have this day served:

Michael Padnos
Attorney at Law
153 Pryor Street S.W.
Atlanta, Georgia 30303

Alfred L. Evans, Jr.,
Assistant Attorney General,
132 State Judicial Building,
40 Capital Square, Atlanta, Ga. 30334
and

R. Byron Attridge,
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Attorney-at-Law,
434 Trust Co. of Ga. Building
Atlanta, Georgia 30303

attorneys in the foregoing matter representing all the parties that are required to be served, each with a copy of this Motion for leave to File a Brief Amicus Curiae and a copy of the attached Brief Amicus Curiae by depositing in the United States mail copies of same in properly addressed envelopes with adequate postage thereon.

Done this 6th day of August, 1969.

Frank B. Zeigler

Frank B. Zeigler,
of Counsel for
The Legal Aid Office of Savannah, Inc.
Room 100
Realty Building
Savannah, Georgia

No. 28

(state of Georgia)
Joiner in brief of appellee, Housing of City of Atlanta, filed on Sept. 11, 1969
(not printed)

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IN THE

Supreme Court of the United States

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No. 266

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Appellees.

On Appeal from the Supreme Court of Georgia

BRIEF OF THE STATE OF GEORGIA (an Appellee)

PART I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

The federal constitutional questions presented to and decided by the Supreme Court of Georgia relate solely to the Fourteenth Amendment, and this Amendment, correctly cited in Appellants' brief, is the sole constitutional provision involved in the instant appeal.

Statutory Provisions

Appellants correctly cite two specific provisions of Georgia's dispossession statutes which they claim to be unconstitutional. Such provisions, however, are but a portion of the entire statutory treatment of the subject. The State of Georgia considers that the omitted statutes are also pertinent to evaluation of Appellants' contentions. The statutory procedure in its entirety is as follows:

Ga. Code Ann. § 61-301

> "*Demand for possession; proceedings on tenant's refusal to deliver.* — In all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or shall fail to pay the rent when the same shall become due, and in all cases where lands or tenements shall be held and occupied by any tenant at will or sufferance, whether under contract of rent or not, and the owner of the lands or tenements shall desire possession of the same, such owner may, by himself, his agent, attorney in fact or attorney at law, demand the possession of the property so rented, leased, held, or occupied; and if the tenant shall refuse or omit to deliver possession when so demanded, the owner, his agent or attorney at law or attorney in fact may go before the judge of the superior court or any justice of the peace and make oath to the facts."

Ga. Code Ann. § 61-302

> "*Warrant for tenant's removal.* — When the affidavit provided for in the preceding section shall be made, the officer before whom it was made shall grant and issue a warrant or process directed to the sheriff, or his deputy, or any lawful constable

of the county where the land lies, commanding and requiring him to deliver to the owner or his representative full and quiet possession of the lands or tenements mentioned in the affidavit, removing the tenant, with his property found thereon, away from the premises."

Ga. Code Ann. § 61-303

"*Arrest of proceedings by tenant; counter-affidavit and bond.* — The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

Ga. Code Ann. § 61-304

"*Issue tried in superior court.* — If the counter-affidavit and bond provided in the preceding section shall be made and delivered to the sheriff or deputy sheriff or constable, the tenant shall not be removed; but the officer shall return the proceedings to the next superior court of the county where the land lies, and the fact in issue shall be there tried by a jury."

Ga. Code Ann. § 61-305

"*Double rent and writ of possession, when.* — If the issue specified in the preceding section shall

be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises."

Ga. Code Ann. § 61-306 (Ga. Laws 1968 pp. 124, 125)

"*Four days' notice to tenant, etc.* — Whenever a warrant shall be sued out, under existing laws, for the eviction of any person as an intruder, or as a tenant holding over, it shall be the duty of the officer in whose hands such warrant may be placed to exhibit the same at once to the defendant, and to give him notice that after the expiration of four days (not counting Sundays or public holidays) said officer will proceed with the execution of such warrant; and unless a counter-affidavit, as provided by law, is filed with said officer within that time, and, in case of tenants holding over, unless bond with good security payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case, shall at the same time be given by the tenant as now required by law, it shall be his duty to proceed forthwith to execute said warrant.

Provided, however, that if the officer is unable to personally notify the defendant notice may be given by delivering same to any person sui juris residing on the premises, or if no person is found on the premises, by tacking a notice on the door of the house situated on said premises; and same shall be deemed sufficient notice.

Provided, further, that if the defendant absconds and has any of his (or her) goods and properties located in a house situated on the premises, it shall be the duty of the officer to break and enter said house for the purpose of removing therefrom the defendant's goods and properties at the expiration of four days after notice (not counting Sundays and public holidays) as heretofore provided."[1]

Ga. Code Ann. § 61-307

"*Officer failing in duty to give notice to tenant.* — Any officer violating the provisions of the preceding section, by failing to give the notice therein required, or by executing any such warrant as is therein named before the expiration of three days from the time of said notice, shall be deemed guilty of a trespass, and liable, together with the sureties on his official bond, in damages to the defendant."

Ga. Code Ann. § 61-308

"*Applicability of Chapter to croppers and servants after termination of employment.* — The provisions of this Chapter shall apply to croppers and servants who continue to hold possession of lands and tenements after their employment as such has terminated, in the same manner as it relates to tenants."

QUESTIONS PRESENTED

1. Whether the bond posting requirement of Ga. Code Ann. § 61-303 is violative of any right secured to tenants, and in particular indigent tenants, by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution?

---

[1]In counties having a population of 500,000 or more, the required notice is six days. See Ga. Laws 1968, pp. 1215-1216.

2. Whether the "double rent" measure of damages fixed by Ga. Code Ann. § 61-305 is violative of any right secured to tenants, and in particular indigent tenants by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT

The instant appeal is taken from a unanimous decision of the Supreme Court of Georgia reported *sub nom. State of Georgia v. Sanks nee Jones, et al.*, 225 Ga. 88, 166 S.E.2d 19 (1969). The unanimous decision of Georgia's highest court reversed an order entered by the Civil Court of Fulton County in three cases which had been consolidated for hearing before the trial court.

The facts, in all relevant particulars the same for each case, may be stated as follows: A dispossessory warrant was taken out by a landlord to regain possession of his property from a tenant who had failed to pay rent [A. 3, 18]. Rather than following the statutory procedure for arresting dispossessory proceedings (i.e. Ga. Code Ann. § 61-303), the tenant in each case filed an application for rule nisi, alleging that Ga. Code Ann. § 61-303 was unconstitutional on its face, and also as applied to her in that her inability to post bond denied her access to the courts to contest the dispossession [A. 5-6, 20-21]. Each of the applications for rule nisi further contended that Ga. Code Ann. § 61-305 was also unconstitutional in that any Georgia tenant desiring to exercise his "right to be heard" would have to run the risk of losing a double-rent judgment if his defense proved to be inadequate [A. 6, 21]. Tenants' constitutional contentions were based upon both the

"due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution and upon the corresponding provisions of the Constitution of the State of Georgia of 1945 [A. 6, 21, 28].

In each case, the Civil Court of Fulton County entered an order on the application for rule nisi directing the landlord and the Chief Marshal of Fulton County to show cause why the tenant should not be allowed to proceed without posting bond pursuant to Ga. Code Ann. § 61-303, and without subjecting herself "to the penal rent provisions" of Ga. Code Ann. § 61-305 [A. 7-8, 22-23]. The State of Georgia was duly served, and while deeming itself to be a statutory party to any and all State court actions seeking to declare enactments of its General Assembly unconstitutional (see Ga. Code Ann. § 110-1106), formally moved for leave to intervene in each of the dispossessory proceedings in order to eliminate any question as to its being a party of record. The trial court entered an order granting the State's motion, consolidating the three cases for hearing, and ordering that the tenants be allowed to remain on the premises until further order of the court, provided that they pay the rent into the registry of the court as it became due [A. 24-25]. An evidentiary hearing was held in the matter on June 5, 1968, at which time evidence was adduced by the tenants tending to show that it was extremely difficult for persons without means to secure the bond called for by statute [A. 11]. The evidence submitted by the tenants further showed that during 1967 only 13 of the approximately 19,000 dispossessory warrants issued by the Civil Court of Fulton County were contested [A. 38]. No evidence was in-

troduced, on the other hand, to show whether this small percentage of contested dispossessory warrants was due to difficulty in securing a bond, or due to the fact that tenants, in the vast majority of cases, simply recognized they had defaulted through failure to pay rent or otherwise, and in fact had no non-frivolous defenses. The constitutional questions were argued by counsel and on October 2, 1968, the Civil Court of Fulton County rendered its decision in a 14-page opinion [A. 27-39]. After noting that the evidence showed that the tenants were indigent and unable to obtain bonds [A. 38], and after saying that the bond posting requirement of the statute was "an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond" [A. 38], the Civil Court concluded:

> "It is the ruling of this Court that Code Section 61-303 being codified from Act of the General Assembly of 1827, as amended, and Code Section 61-305, being codified from the Act of the General Assembly of 1827, as amended, are unconstitutional insofar as said statutory provisions require tenant as a precondition to the defense of his case to tender a bond with good security, payable to the landlord for the payment of such sums, with costs, as may be recovered against him on the trial of the case; and insofar as said statutory provisions permit a landlord to recover from the tenant an amount equal to double the rent that may become due from date of the issuance of the warrant" [A. 39].

It was ordered that defendant tenants be allowed to file any and all defenses they might have without first posting bond and without being subjected to the "double rent" provision of Ga. Code Ann. § 61-305 [A. 38].

The order also required the tenants to continue their rental payments into the registry of the court [A. 38-39] and when one of the three tenants subsequently failed to comply with this condition, an order was entered, on October 9, 1968, allowing the Marshal to proceed with her eviction.[2]

Attempting to act with dispatch because of the large number of cases in which the issues were being raised and because of the many cases being held in abeyance pending final judicial determination of the case at bar, the State of Georgia, on October 8, 1968, filed its notice of appeal to the Supreme Court of Georgia.

Upon appeal, the Supreme Court of Georgia, noting that it would be an extremely unusual circumstance for an owner of rental property to attempt to oust a tenant who was in fact complying with the terms of his lease, noting further that the limited matters to which statutory dispossessory proceedings applied (i.e. failure to pay rent, holding over, or holding as a tenant at will or sufferance) were matters which should be within the knowledge of the tenant, and observing that rich as well as poor are to be accorded protection under the "equal protection" clause of the United States Constitution, unanimously held that the bond requirement was not only reasonable, but entirely appropriate and equitable to guarantee payment by one who occupies another's property, enjoying the use and benefit thereof, while he resists dispossession. *State of Georgia v. Sanks, et al.*, 225 Ga. 88, 166 S.E.2d 19 (1969) [A. 40-43]. Ten-

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[2]I.e., *Lillie Allison* (Warrant No. 69, 418 in the Civil Court of Fulton County).

ants' motion for rehearing was denied without further comment by the Supreme Court of Georgia [A. 44].

Probable jurisdiction was noted by this Court on June 23, 1969 [A. 45].

PART II

ARGUMENT AND CITATION OF AUTHORITIES

1. *The bond posting requirement of Ga. Code Ann. § 61-303 is a reasonable method of protecting valuable property rights of owners of rental property against irreparable injury and is not violative of any right secured to a tenant, indigent or otherwise, under the "due process" or "equal protection" clauses of the United States Constitution.*

Ga. Code Chapter 61-3 affords an owner of rental property with a summary procedure for recovery of the same where a tenant fails to pay rent, holds over, or for any reason is a tenant at will or sufferance. The summary nature of the procedure is quite obviously intended to lessen the possibility of irreparable financial loss to the owner by such things as "free rent" to a tenant during protracted litigation. In the absence of provision to the contrary, it is an integral part of the lease contract to which both parties have agreed. Accord, e.g. *McCullough v. Virginia,* 172 U. S. 102, 124 (1898); *Dorsey v. Clements,* 202 Ga. 820, 824, 44 S.E.2d 783, 787 (1947); 17 Am.Jur.2d *Contracts* § 257. While the procedure does provide for a means whereby a tenant can arrest his dispossession and secure judicial review of the matter, the same consideration of avoiding deprivation of property rights and irreparable fiscal loss

to the owner of the premises has led the General Assembly to require that a tenant desiring to remain in possession during litigation post bond, payable to the owner, for such damages as may be recovered against him on trial of the case. This is accomplished by Ga. Code Ann. § 61-303, which provides:

> "61-303. *Arrest of proceedings by tenant; counter-affidavit and bond.* — The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

Tenant-appellants, notwithstanding their agreement to this procedure when they entered into their lease contracts, now claim that they should not be bound because (they allege) the bond posting requirement of the above code section is unconstitutional.

While it seems to the State of Georgia to be a strange "constitutional right" which would allow one citizen to launch his personal war on poverty by expropriating the property of another citizen, this apparently is what tenants argue. They claim that the bond posting requirement of Ga. Code Ann. § 61-303 invidiously bars tenants, particularly indigent tenants, from contesting

their dispossession in court. It is said that this denial of access is violative of rights secured to said tenants under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

In showing that tenants' contention overlooks the fact that a landlord too has constitutional rights (including the "due process" right not to be deprived of his property without compensation) and in urging that the bond provision is an entirely reasonable means of protecting this interest against wrongful expropriation by tenants (whether the tenants are indigent or merely indignant) we think it is probably appropriate to commence by observing that if tenant-appellants' contentions really go so far as to maintain that *any* bond posting requirement as a requisite to judicial relief is *per se* unconstitutional if and when the prospective litigant is without means to furnish same, their position would be so devoid of merit as to be essentially frivolous.

Bond posting requirements are quite generally employed as a limitation on the right of access to both the Federal courts and the State courts. See e.g., 31 U.S.C. § 518 (injunction to stay distress warrant); 29 U.S.C. § 107 (temporary injunction in labor disputes); 28 U.S.C. § 1446 (removal of cases); Ga. Code Ann. § 37-1403 (security bond double the value of plaintiff's claim in *ne exeat*); Ga. Code Ann. § 82-202 (forthcoming bond double the value of the property in possessory cases); and Ga. Code Ann. § 46-401 (dissolution bonds in garnishment). And it has long been settled that the Fourteenth Amendment does not prevent a State from prescribing reasonable and appropriate conditions

precedent to the seeking of judicial relief through legal proceedings of a specified kind or class *so long as the basis of the distinction is real and the condition imposed has a reasonable relation to a legitimate object.* E.g., *Jones v. Union Guano Co.*, 264 U.S. 171, 181 (1924) (where a farmer was required to obtain a chemical analysis, obviously an expense, as a condition precedent to suing a fertilizer company for crop damage); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) (where a New Jersey statute required small stockholders bringing derivative actions to give security for reasonable expenses of the defendants, including counsel fees); see also, 16 Am.Jur.2d *Constitutional Law* § 535; 16A C.J.S. *Constitutional Law* § 559, p. 507. In *Cohen v. Beneficial Loan Corp., supra,* at p. 552, this Court pointed out that:

> "A state may set the terms on which it will permit litigation in its courts . . . and it cannot seriously be said that a state makes such *unreasonable* use of its power as to violate the Constitution when it provides liability and security for payment of *reasonable* expenses if a litigation of this character is adjudged to be unsustainable. It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met."

So far as the State of Georgia is aware, the same conclusion has been reached in all other judicial decisions

involving like questions of bonds, security or cost deposits as a condition of litigation, see e.g., 20 Am.Jur.2d *Costs* § 37; 20 C.J.S. *Costs* §§ 125-127, with an especially good analysis and review of authority being given by the Supreme Court of Idaho in *Pigg v. Brockman*, 79 Idaho 233, 314 P.2d 609, 611-14 (1957).

We think it necessarily follows that the true question presented by tenants' constitutional contention is not whether bond posting requirements can be sustained as to individuals who happen to be unable to furnish the same, but is instead whether the particular bond posting requirement of Ga. Code Ann. § 61-303 is a *reasonable means* to achieve the obviously legitimate legislative end or objective of safeguarding a landlord's valuable property rights from irreparable loss through wrongful expropriation by a tenant.

In dealing with this core question it seems to Appellant that an understanding of the bond requirement is facilitated through a brief review of its historical antecedents. Starting with the common law, the situation was one where notwithstanding the sometimes appalling wear and tear upon tenants, the property owner was permitted to use such force as was necessary to physically remove them from the premises if they were wrongfully in possession and refused to vacate. See, e.g. *Entelman v. Hagood*, 95 Ga. 390, 22 S.E. 545 (1894); 36 C.J. *Landlord & Tenant* § 1761. This was, of course, hardly a unique approach under the common law. The "self-help" doctrine was used in numerous situations and it may well be pointed out that in some instances it remains with us today. So far as we are aware, a trespasser, as well as the man who comes to dinner and then

refuses to depart, may even in this sometimes civilized age be removed by the owner *vi et armis*. 6 Am.Jur.2d, *Assault and Battery* § 168.

This is not to suggest that the tenant was a mere serf sans right or remedy under the common law. In the case of a wrongful eviction he had, in addition to his obvious right to sue the landlord for breach of the lease contract, a cause of action in tort. See *Mizell v. Byington*, 73 Ga. App. 872, 875, 38 S.E.2d 692 (1946); *Yopp v. Johnson*, 51 Ga. App. 925(1), 181 S.E. 596 (1935) [Cert. denied]. While it is quite true that both remedies can be criticized in that they do not serve to prevent the inconvenience nor injury of dispossession to the tenant before it is inflicted, this too is but the customary common law norm of providing for compensation *after* the injury.[3] Moreover, it must be remembered in landlord-tenant disputes that the property is owned by the landlord and not by the tenant. The latter's interest is ordinarily usufructuary only, Ga. Code Ann. § 61-101, and it presumably would have been as usual at common law as it is today for the lease agreement to contain a re-entry clause to protect the property owner against the tenant's default regarding such conditions of the lease as rental payments. We sincerely doubt that adherence to the common law rule would violate the Constitution, and in arguing before the trial court, counsel for tenant-appellants as a matter of fact quite frankly conceded

[3]If the tenant were to be forewarned of his impending eviction, on the other hand, he would also have been able to restrain his eviction in equity, provided that proper grounds for such equitable relief could be shown. See, *Sims v. Etheridge*, 169 Ga. 400(1), 150 S.E. 647 (1929); *Huff v. Markham*, 71 Ga. 555 (1884).

that Georgia had no constitutional obligation to abrogate the common law rule either through adoption of a statutory dispossessory proceeding or otherwise.

This being so, we have some difficulty in seeing just how the creation by statute of *a new and additional remedy for tenants* in dispossession situations (i.e. additional to their admittedly constitutionally sufficient common law remedies) could conceivably be in violation of the constitutional rights of the benefited class merely because the new and additional remedy is conditionally, rather than absolutely, available.[4] As we see it, the General Assembly could constitutionally have provided by statute for eviction by the sheriff upon the property owner's affidavit without any provision at all for arrest by the tenant. As harsh as this might have been, it would still have amounted to an improvement over the tenant's lot at common law in that an officer of the law, being more apt to be impartial about the matter than the property owner, would be less apt to use excessive force or cause physical injury to the tenant in the course of removing him than would be the situation where the eviction is by the hand of the landlord or his hired "strong arms."

But while the General Assembly could have stopped here (just as it could have retained the common law rule of "self-help"), it in fact went further in the ten-

[4]It should not be overlooked that in providing for this new and additional right for the tenant the General Assembly took away the valuable common law right of the property owner to use such force as was necessary to secure immediate compliance with his demand upon the tenant to vacate. See *Entelman v. Hagood*, 95 Ga. 390, 22 S.E. 545 (1894).

ant's behalf. It provided that the tenant could actually retain possession of the owner's property pending judicial decision by filing a counter-affidavit and posting bond (i.e. Ga. Code Ann. § 61-303).

We have already alluded to the very real necessity of a bond or some equally stringent pecuniary requirement as a condition to a tenant's retention of possession pending adjudication of the matter by the courts. In the absence of such protection or guarantee to the owner to the property, a tenant would be in position to receive perhaps six months or more free rent upon even the most frivolous, bad faith defense. In such event the property owner, particularly where the tenant truly is indigent, would in all probability be deprived of any possibility whatsoever of recovering his loss. Nor would simple payment of the rent into the registry of the court afford adequate protection in all cases. Such continued rental payments would be of little solace to the property owner in "hold over" situations, particularly where the owner may be being deprived of a higher use of the property. Nor can it be over-emphasized where as here the controversy is one growing out of a contractual relationship, that *payment into the registry of the court is not what the parties agreed to.* In the absence of any provision to the contrary in their lease contracts (and tenant-appellants have neither alleged nor shown any contrary provision) the relevant dispossessory statutes of the State of Georgia are integral parts of the contracts to which they have agreed. See *Dorsey v. Clements,* 202 Ga. 820, 824, 44 S.E.2d 783, 787 (1947); Accord, *McCullough v. Virginia,* 172 U.S. 102, 124 (1898); 17 Am.Jur.2d *Contracts* § 257.

Surely the position of tenant-appellants in the situation presently before the Court is superior to that of the plaintiffs who urged a similar "lack of access" argument in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). There it appeared that the security requirement might foreclose resort by the affected plaintiffs "to the *only* available judicial remedy for protection of their rights." 337 U.S. at p. 552. Here the statutory procedure of arresting dispossession through counter-affidavit and the posting of bond, a procedure which tenant-appellants consented and agreed to when they executed their lease contracts, is but one of several alternative remedies available to a tenant. As already pointed out, he could recover damages for his wrongful dispossession either in contract or in tort (with the ever-present possibility of punitive damages in the latter), and in an appropriate case he might be able to restrain his eviction by proceeding in equity.[6]

The situation, in other words, is one of balancing the risk of what in many cases would be an absolutely irreparable injury to one class of citizens, to wit: owners of rental property, against the risk of injury which clearly is compensable and *not* irreparable to another

[6]While equity will not ordinarily interfere with statutory remedies to collect rent and recover property, and while inability to post bond would not *ipso facto* afford grounds for equitable relief in Georgia, e.g., *Flynn v. Merck*, 204 Ga. 420, 49 S.E.2d 892 (1948), it is equally clear that should other equitable issues be involved (e.g., fraud on the part of the landlord), the tenant would have a remedy in equity which could well include the enjoining of the prosecution of a dispossessory warrant. See e.g., *Sims v. Etheridge*, 169 Ga. 400(1), 150 S.E. 647 (1929); *Huff v. Markham*, 71 Ga. 555 (1884). *Accord, Flynn v. Merck, supra*, at p. 424.

class of citizens, to wit: tenants. We think that under the circumstances the balancing of such risks to each of the two classes of private citizens which is provided in Ga. Code Ann. § 61-303, including the bond posting requirement therein, is a reasonable means for the General Assembly to achieve the undoubtedly legitimate legislative end or objective of safeguarding the valuable property rights of the owner from irreparable loss through wrongful expropriation by a tenant. Nor is the General Assembly of the State of Georgia unique in this approach to the problem. See, e.g., Burns Indiana Statutes Annotated § 3-1306.

In concluding discussion of the constitutionality of Ga. Code Ann. § 61-303, we wish to point out that we do not overlook such cases as *Griffin v. Illinois,* 351 U.S. 12 (1955); *Burns v. Ohio,* 360 U.S. 252 (1959); and *Smith v. Bennett,* 365 U.S. 708 (1961). It is our position that these cases, all of which involve issues of the State's imposition of a price tag upon the personal liberty of persons convicted of a crime and desirous of having their conviction reviewed, are simply not apropos to the instant situation which involves a legislative attempt to balance the risk of injury likely to be incurred by one or the other of two classes of citizens having opposed economic interests. The difference has been noted by a unanimous three-judge United States District Court in *Willie Williams and Sam Martin, etc. v. T. Ralph Grimes,* Civil Action No. 10025 (N. D. Ga., decided April 18, 1966) [unreported], where with specific reference to the attacked bond posting requirement of Ga. Code Ann. § 61-303, the court observed: ". . . the bond requirement is entirely reasonable for the vast majority

of cases." Nor is *Hovey v. Elliott,* 167 U.S. 409 (1897) pertinent. There the situation involved a price tag upon the right of an individual to present his defenses in an adversary proceeding against him (i.e. where the defendant had been brought into court *against his will*). Here, it is the *tenant* who seeks (a) to obtain adjudication by the court, and (b) the immediate affirmative remedy of being allowed to retain possession of another's property during the course of the litigation. That the tenant is named as the "defendant" in the summary and ordinarily unlitigated statutory dispossession procedure does not make the situation analogous to *Hovey*. The Constitution is concerned with substance and not mere form. Here it is the tenant, notwithstanding the fact that he is labeled as the "defendant" *in the dispossessory warrant,* who initiates actual litigation. It is in reality the property owner who is brought into court against his will. In any event, it is quite generally held that fiscal requirements such as bonds may be required of defendants just as they are of plaintiffs in situations where the defendant seeks affirmative relief and thereby assumes the position of a plaintiff. See 20 Am.Jur.2d, *Costs* § 37. Nothing in *Hovey* is to the contrary.

Finally, we respectfully suggest to the Court that unlike the above discussed decisions, a case which does have relevance to the present situation is *Johnston v. Byrd,* 354 F.2d 982 (5th Cir. 1965). There an indigent plaintiff claimed she was being deprived of her "due process" and "equal protection" rights by an Alabama statute requiring her to post bond in an amount double the value of the property involved, in order to restrain

sale of that which was alleged to be *her own property* wrongfully seized in connection with the execution of a judgment against her husband. The action was dismissed with Judge Rives, in a concurring opinion, stating that the bond requirement was entirely reasonable and that the plaintiff's constitutional claim was insubstantial and no more than a colorable attempt to obtain Federal jurisdiction. We think the constitutional contentions of tenant-appellants are equally insubstantial here and that the Supreme Court of Georgia was entirely correct in rejecting the same.

2. *The "double rent" measure of damages set forth in Ga. Code Ann. § 61-305 is a reasonable method of protecting valuable property rights of owners of rental property against irreparable injury and is not violative of any rights secured to a tenant, indigent or otherwise, under the "due process" or "equal protection" clauses of the United States Constitution.*

Ga. Code Ann. § 61-305 provides:

> *"Double rent and writ of possession, when.* — If the issue specified in the preceding section shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises."

Much of what has already been stated concerning the

necessity and constitutionality of the bond posting requirement of Ga. Code Ann. § 61-303 is equally true of the "double rent" measure of damages set forth in Ga. Code Ann. § 61-305. Again there is the legislative attempt to balance the risk of what in many cases would be an absolutely irreparable loss to one class of citizens, to wit: owners of rental property, against the interests of and risks to another class, to wit: tenants. In fixing the measure of damages, we think the legislature has acted well within its constitutional limits in recognizing that the fiscal injury to the property owner whose property has been wrongfully held by a tenant, frequently if not almost always exceeds the bare rent or rental value. In addition to lost rent, the owner is faced with the expense of litigation and the fact that a tenant, who in addition to being unhappy with his landlord probably realizes that he ultimately will be required to vacate, cannot be expected to use his best efforts to avoid waste or properly maintain the property. Then too there is the expense of securing a new tenant and preparing the premises for his occupancy. Under the circumstances we think that Ga. Code Ann. § 61-305, as Ga. Code Ann. § 61-303, is an entirely reasonable means for the General Assembly to seek to achieve the undoubtedly legitimate legislative objective of protecting the valuable property rights of a landlord from irreparable loss at the hands of the tenant who wrongfully remains in possession.

We think there is little merit in the suggestion that a statutory measure of damages cannot take into consideration such difficult-to-ascertain items. To the contrary, statutes providing for double or even treble dam-

ages are relatively common in both the State and Federal systems, see e.g., 25 C.J.S. *Damages* § 128; 22 Am.Jur.2d, *Damages* § 267, one conspicuous example being the Clayton Act's allowance of treble damages for injuries caused by either intentional or unintentional violations of the Antitrust laws. 15 U.S.C. § 15. In *Missouri Pacific Railway Co. v. Hames,* 115 U.S. 512, 516-17 (1885), the United States Supreme Court rejected "equal protection" and "due process" attacks upon a State statute providing for multiple damages, holding such legislation to be constitutionally permissible and a matter which addressed itself to the discretion of the legislature. All state supreme courts passing on the question would appear to have reached the same conclusion. See e.g., 22 Am.Jur.2d, *Damages* § 267, p. 362 (citing numerous cases). In situations where one person has continued to wrongfully possess the property of another it is hard to fathom how the minimal protection and compensation which the statute provides for the property owner could be said to be unconstitutional.

CONCLUSION

Rights guaranteed by the "equal protection" and "due process" clauses of the Fourteenth Amendment should protect the affluent as well as the indigent. The State of Georgia believes that owners of rental property (not all of whom are wealthy slum landlords and many of whom have their own mortgage payments to meet) are also entitled to certain minimal protection regarding their property rights and further believes that the means chosen by its General Assembly to provide for protection of such rights at the time the General Assembly abrogated the owner's valuable "self help" right under the common law, is at the very least one appropriate means of affording such protection. Appellants agreed to this procedure at the time they entered into their lease contracts with the property owners. We think the unanimous decision of the Supreme Court of Georgia was correct and should be affirmed.

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No. 28

Vide No. 27 for brief amici curiae of The Center on Social Welfare Policy and Law, et al. (filed Oct. 13, 1969)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SANKS ET AL. *v.* GEORGIA ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 28. Argued December 8, 1969—Reargued November 17–18, 1970—Decided February 23, 1971

As a condition precedent to making a defense against a summary eviction proceeding, Georgia law provided that the tenant post a surety bond for double the amount due at the end of the trial, the landlord becoming entitled to such double rent should the tenant lose his case. Following the Georgia Supreme Court's upholding of that statutory scheme over due process and equal protection challenges by appellants, indigent tenants seeking to contest summary eviction, appellants left the premises their landlords initially sought to recover, and entirely new legislation was enacted containing neither the bond-posting nor double-rent requirement. *Held:* These ensuing developments make it inappropriate for this Court to resolve the issues originally raised by appellants since it cannot be determined to what extent adjudication of those issues would be material to any further litigation ensuing on remand. Pp. 3–9.

225 Ga. 88, 166 S. E. 2d 19, appeal dismissed and remanded.

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 28.—October Term, 1970

Lelia Mae Sanks et al., Appellants, v. State of Georgia et al. | On Appeal From the Supreme Court of Georgia.

[February 23, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

We noted probable jurisdiction in this case, 395 U. S. 974 (1969), because the judgment of the Georgia Supreme Court appeared to raise substantial questions under the Fourteenth Amendment that were deserving of our plenary consideration, and because whatever conclusion this Court might reach with respect to them would definitively settle this aspect of the litigation. In brief, the Georgia Supreme Court upheld, over due process and equal protection challenges, a state statutory scheme that compelled appellants, both indigent persons who sought to contest landlord petitions for summary eviction from their homes, to post, as a condition precedent to offering any defense to summary eviction, a surety bond in double the potential amount of rent due at the end of trial. The statutes, this aspect of which was also upheld by the Georgia Supreme Court, provided further that the landlords would become entitled to such double rent should the tenant-appellants lose their cases.

The case was first heard by us at the 1969 Term, and was thereafter set for reargument at the present Term. 399 U. S. 922 (1970). At reargument it became apparent that events occurring subsequent to our notation of

probable jurisdiction had so drastically undermined the premises on which we originally set this case for plenary consideration as to lead us to conclude that, with due regard for the proper functioning of this Court, we should not now adjudicate it.

I

The Georgia statutory scheme under which this case was initiated, Ga. Code Ann. Tit. 61, §§ 301–306, operated in the following manner. A landlord seeking summary eviction could file an affidavit in a local court, alleging that the tenant, for one or more statutorily enumerated reasons, was unlawfully holding possession of the premises and had refused the landlord's demand to relinquish possession. (§ 61–301.) When such an affidavit had been filed the local judicial officer was required to issue a "warrant or process" to the sheriff directing him to "deliver to the owner" the premises described in the affidavit. (§ 61–302.) The sheriff was to give the tenant four days' notice before executing the dispossessory warrant. (§ 61–306.)

The tenant could prevent immediate eviction only by filing a counter-affidavit, alleging one of several specified defenses and accompanied by a surety bond "for the payment of such sum, with costs, as may be recovered against him on the trial of the case." (§ 61–303.) Only if the tenant followed these procedures was he then entitled to a trial on the issues raised by the affidavits. (§ 61–304.) Against this background, § 61–305 provided:

> "If the issue specified in the preceding section shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth . . . ."

In the case before us, appellants Sanks and Momman were each served with dispossessory warrants on May 21, 1968, and July 17, 1968, respectively (Appendix, at 3, 18), and then applied for (Appendix, at 5, 20) and eventually obtained (Appendix 24–39) from the Civil Court of Fulton County a "rule nisi" permitting appellants to remain in possession of their respective premises pending resolution of the factual issues raised by their applications, so long as they timely paid their rent into court during the pendency of the litigation. Both the bond posting requirement (§ 61–303) and the double rent damages measure (§ 61–305) were declared unconstitutional and, hence, inapplicable to these eviction proceedings. Appendix, at 27–39. On an interlocutory appeal, the trial court's constitutional declarations were set aside by the Supreme Court of Georgia, 225 Ga. 88, 166 S. E. 2d 19 (1969), and the judgment of the lower court was reversed.

II

Since we noted probable jurisdiction the posture of this case has shifted dramatically. Both Mrs. Momman and Mrs. Sanks have removed from the premises originally sought to be recovered by their landlords. In addition, the Georgia General Assembly has repealed virtually the entire statutory scheme that has governed this litigation from its inception and replaced it with a new one, effective July 1, 1970, that contains neither the bond posting nor double rent requirement. 1 Georgia Acts and Resolutions 968–972 (1970). Under the new law, dispossessory actions will still be commenced by the landlord's execution of an affidavit. Now, however, this merely compels the local judicial officer to cause the tenant to be summoned to a hearing (§ 61–302), and the tenant can retain possession and force a trial of any defenses he may wish to raise simply by answer-

ing the affidavit, orally or in writing, at the hearing. (§ 61–303.) Expedited trials are encouraged. If the litigation has not been concluded within a month of the execution of the landlord's affidavit, the tenant may retain possession by paying into court all rent as it becomes due, in addition to any rent that was due but not paid prior to issuance of the summons. (§§ 61–303, 61–304.) If the landlord ultimately prevails, his monetary damages, if any, are to be based on the actual, not double, rent found due. (§ 61–305.) Similarly, the tenant may, in effect, stay execution of the dispossessory warrant pending appeal of an adverse determination simply by paying rent, as it accrues, into the court. (§ 61–306.)

III

The crux of this controversy from its inception has been appellants' insistence that they, not their alleged landlords, had the right to lawful possession of the premises in dispute and their demands that they be permitted to remain in possession pending the outcome of the litigation.[1] With appellants' voluntary removal from the premises this aspect of the case is clearly moot. We have been apprised of no basis in the statutes or case law for assuming that were this Court now to hold Mrs. Sanks and Mrs. Momman were constitutionally entitled to proceed in the trial court without first posting a double-rent bond, they could then seek a decree under the statutes here at issue returning them to possession of the premises. The repealed statute spoke only of enabling a tenant already in possession to contest forcible eviction upon posting a bond. Indeed, neither appellants nor appellees—all of whom resist the suggestion that the case as a whole is moot—contend that this aspect

[1] Mrs. Sanks intended to contest the dispossessory warrant on the grounds that she is not, in fact, the tenant of the person seeking to evict her. Appendix, at 5.

of it is not moot. There is thus no reason to believe that, on remand, either appellant, if successful in this Court, could litigate, in the context of any proceeding that might conceivably be governed by any of the provisions of these repealed Georgia statutes, a claim to be put in possession of the premises she originally occupied.

In support of the continued justiciability of the case, appellants rely upon a subsidiary aspect of this controversy which they claim remains alive. Were this Court to affirm the Georgia Supreme Court on the merits, the case would presumably be remanded to the trial court in accordance with the Georgia Supreme Court's mandate. There, argue appellants, those who initially procured the dispossessory warrants might then move for entry of a judgment for double damages as provided in former § 61–305. Appellants fear that such a judgment might automatically be entered because their removal from the premises might be construed as effectively conceding their lack of substantive defenses or that, even if they are still technically entitled to raise defenses, appellants' ability to do so will be conditioned on first posting the bond. Such a result is possible only if a number of factors coalesce. First, the original moving parties, the alleged lessors, would have to decide to seek such damages from these relatively impecunious appellants. Second, the Georgia courts would have to rule that such request for damages should be adjudicated under the repealed statutes. Third, it would also be necessary for the state courts to hold that those statutes contemplated awarding double rent in the circumstances here and (see *infra*) on a basis that renders material the bond-posting provision.

Beyond all this, the original posture of this case has been further upset by the apparent fact that prior to moving out, and in compliance with the order of the trial court, appellants paid their rent money into the court's

registry as it became due, money that still remains on deposit there. Transcript of oral reargument, at 10–11, 26.

With the case in this Court thus so reoriented, it is impossible for us to predict whether and to what extent our adjudication of the issues originally presented would now be material to any further litigation that might ensue on remand. Whether the original initiating parties will seek double damages is a matter wholly beyond the control of this, or any other, court. Whether the existence of funds in the registry of the trial court will necessitate an adversary proceeding to redistribute them and, if so, whether that proceeding would be governed by the repealed statutes which, on their face, do not even remotely speak to this problem, are matters of pure conjecture. Because the former statutes provided for double damages only "where the issue . . . [is] determined against the tenant" (former § 61–305) and provided for joinder of issue only where a double rent bond had first been posted (former §§ 61–303, 61–304), we are quite unable to say whether the Georgia courts would nevertheless hold this language sufficiently elastic to permit a claim for double damages where eviction was arrested by court order rather than a bond, yet insufficiently flexible to permit simultaneous waiver of the bond-posting requirement before adjudication of such a claim. Nor can we predict whether and to what extent repeal of the former statutory scheme would, on remand, be held to alter any of the conclusions respecting it which the Georgia courts might otherwise adopt in this context.[2] All these issues, so far as it appears, would be matters of first impression for the Georgia judiciary.

[2] Georgia has a statutory policy disapproving the retroactive application of new statutes. Ga. Code Ann. §§ 102–104. However, the statute expressly distinguishes "[l]aws looking only to the remedy or mode of trial." Conceivably, this case might be held to fall within

IV

Given this imponderable legal tangle, involving, as it does, purely matters of state law, we perceive no other responsible course for this Court than to decline, at this stage, to adjudicate the issues originally presented. We do not rest this conclusion on a determination that the case is moot. Conceivably, appellants may on remand be subjected to the double-rent or bond-posting requirements of the former statutes. But it has always been a matter of fundamental principle with this Court, a principle dictated by our very institutional nature and constitutional obligations, that we exercise our powers of judicial review only as a matter of necessity. As said in *United States* v. *Petrillo*, 332 U. S. 1, 5 (1947), "We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity." Manifestly, it cannot plausibly be maintained that this is such a case. Indeed, the only thing that is now apparent about this lawsuit is that the clear-cut constitutional issues it formerly presented cannot with any certainty be said to be relevant to the issues remaining in it, if, in fact, any issues do remain.

Moreover, even were the constitutional issues certain to arise below we cannot foretell the context in which they will appear. Possibly the double-rent provision will be successfully invoked, but not the bond-posting requirement. Similarly, if the latter is held applicable, we would at this stage be required to adjudicate, in advance of that fact, its validity as a precondition not to resisting summary eviction, which is its normal and clearly intended use, but to contesting a claim for damages only.

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that exception. Moreover, we cannot foretell whether a subsequent motion for double damages would be treated as, in effect, a new lawsuit filed well after passage of the new Act.

The operative competing constitutional considerations, particularly the nature and scope of the State's interest in imposing such a barrier to litigation, may well be significantly different depending on the principal purposes for which the bond is required. Yet, given the debilitated state of this lawsuit, we could address only the subsidiary problem—and this in a legal context where we would not know whether that problem will ever arise.

The principle of prudent restraint we invoke today is nothing new, although, happily, it has not frequently proved necessary to dispose of appeals on this basis. *United States* v. *Fruehauf*, 365 U. S. 146 (1961), provides an apt analogy. There the United States had appealed the dismissal of an indictment brought under § 302 (a) of the Taft-Hartley Act, which made it unlawful "for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees," where the lower court had construed a government pre-trial memorandum as a concession that the transaction forming the basis of the indictment was a loan and held that the statute did not penalize management for loaning money to union officials. This Court noted probable jurisdiction to consider the validity of this construction of the statute, but after oral argument the Solicitor General represented to the Court that he felt the Government was free, on remand, to prove the transaction came within the statute because its particular facts revealed this was not a bona fide loan. This occurrence left the precise issue to be decided so opaque and the extent to which a decision would resolve the controversy so uncertain that the Court, in effect, was being asked to render an "advance expression of legal judgment upon issues which remain unfocused," 365 U. S., at 157. Accordingly, the Court remanded the case without further adjudication.

In the case now before us subsequent events have produced similar consequences. The focus of this lawsuit has been completely blurred, if not altogether obliterated, and our judgment on the important issues involved is potentially immaterial. Indeed, the instant case is obviously more compelling than *Fruehauf*, since this one presents an issue of constitutional, not statutory, interpretation.

Similarly, in *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549 (1947), the Court declined to adjudicate an appeal presenting important constitutional issues because those issues were, on close inspection, so intertwined with complex problems of construing the Los Angeles Municipal Code that it was not possible to tell with precision at that stage in what context and to what extent the appellant's freedom was being restrained. So, here, we do not know, assuming the bond-posting or double-damages provisions ultimately are successfully invoked, in what context this will occur, or what the precise rationale for applying them will be.

In short, resolution by this Court at this time, of the issues originally raised by appellants would not be appropriate. We leave ourselves completely free, of course, to review these issues should appellants' fears that they will be adversely affected by the repealed statutes subsequently be confirmed by proceedings in the Georgia courts.

Accordingly, the appeal will be dismissed and the case remanded to the Supreme Court of Georgia.

It is so ordered.

MR. JUSTICE BLACK concurs in the judgment of the Court dismissing this appeal but does so specifically on the ground that the case is now moot.